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AMERICAN
INTER-STATE LAW.

BY

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AMERICAN INTER-STATE LAW.

CHAPTER I.

INTRODUCTION.

The object of this volume is to treat of American Inter-State Law as the same exists under our peculiar system of duplex government, and it is therefore no part of our purpose to discuss the doctrine of international law, or law of nations, as the same exists between, and is recognized by, nations and states that are *entirely* foreign to each other; but to this we will only refer when necessary in connection with the more immediate subject of our work.

Nor is it our purpose, except as its relevancy may incidentally occur, to treat of the political powers, or of the political functions, of the several departments of the State or national governments; for, as a general principle, the exercise of these is not the subject of *judicial* cognizance or control.¹ Thus, in *Williams v. Suffolk Ins. Co.*,² the Supreme Court of the United States advert to this as a settled principle, in these words: "In the cases of *Foster v. Neilson*, 2 Pet. 253, 307, and *Garcia v. Lee*, 12 Pet. 511, this court has laid down the rule, that the action of the political branches of the government, in a manner that belongs to them, is conclusive." In the case of *Mississippi*

¹ *Gelston v. Hoyt*, 3 Wheat. 246; *Jones*, 5 How. 343; *Luther v. Borden*, 7 How. 1; *United States v. Holliday*, 3 Wall. 407; *Jones v. Walker*, 2 Paine, 688; *Georgia v. Stanton*, 6 Wall. 50; *Mississippi v. Johnson*, 4 Wall. 475; *Wisconsin v. Duluth*, 2 Dillon, 406.

² 13 Pet. 420.

v. *Johnson*, President of the United States,¹ there was an application by bill in equity for a writ of injunction, to restrain the President from executing certain acts of Congress, and the Supreme Court of the United States, in denying the application, said: "Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court, and refuses to execute the acts of Congress, is it not clear that collision may occur between the executive and legislative departments of government? May not the House of Representatives impeach the President for such refusal? And, in that case, could the court interfere in behalf of the President thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves." So, also, in the case of *Fellows v. Blacksmith*,² in which the validity of an Indian treaty was attempted to be drawn in question, the Supreme Court of the United States said: "An objection was taken on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band, in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect, and operation, than they can behind an act of Congress."

In the case of *The Cherokee Nation v. Georgia*,³ and cited in *Georgia v. Stanton*,⁴ the United States Supreme Court, MARSHALL, Ch. J., said: "The bill requires us to control the legislature of Georgia, and to restrain the execution of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the province of the judicial department."

¹ 4 Wall. 500.

² 19 How. 366.

³ 5 Pet. 1.

⁴ 6 Wall. 73.

In the same case, JOHNSON, J., said in reference to the bill of complaint: "Much of the matters herein contained by way of complaint, would seem to depend for relief upon the exercise of political powers; and, as such, appropriately dévolving upon the executive, and not the judicial department of the government."¹

American Inter-State Law — Defined. — The term American Inter-State Law, as here used, embraces the law which governs the American States in their dealings and relations with each other, as well as with the national government, and the extent of recognition and binding force which is accorded the citizens and laws of each State, and of the national government, in the American courts.²

¹ Any case which asks the court to entertain jurisdiction of a political question, and to decide it, will not be considered by the same. To do so would encroach upon the supreme powers of the co-ordinate branches of government. *U. S. v. Baker*, 5 Blatchf. 6; *The Hornet*, 2 Abb. 35; *The Protector*, 12 Wall. 700; *Van Antwerp v. Hulburd*, 7 Blatchf. 426; *Grossmeyer v. U. S.*, 4 Nott & H. 1; *Marbury v. Madison*, 1 Cr. 166.

² The term American Inter-State Law is somewhat akin to American private international law, but it is much broader and more comprehensive. On the general subject the reader is referred to Story's *Conf. of Laws*; Wharton's *Conf. of Laws*; Burge's *Commentaries on Colonial Law*; Gardner's *Institutes of American Law*; Westlake's *Private International Law*, and Foote's *Private International Law*, a work just published in England.

CHAPTER II.

COMITY — NATURAL RIGHT — LAW OF NATIONS AND UNIVERSAL LAW.

1. **Comity.** Although the relations of the several American States to each other do not rest upon the ordinary principles of comity alone, yet these relations are not such as to exclude the doctrine of comity from their inter-state code, or from their conduct toward each other as separate states, for municipal purposes; but such rather as should increase their good neighborhood and regard for each other.¹

The observance of comity is not a matter of obligation, ordinarily, between states, but is mere matter of voluntary courtesy and favor, which may be extended or withheld at pleasure.² It is in virtue of this voluntary consent, expressed or implied, and this only, that the laws of one entirely independent state are enforced or administered in the courts of another, to any extent, or in any respect whatever in the absence of compact or treaty stipulations providing therefor.³

But where no inhibition to the exercise thereof exists, then such comity is impliedly permitted, as to such matters, and to such an extent, as does not conflict with the local policy, or differ from the local laws of the forum, when the rights of persons are involved, which are of a transitory nature.⁴ Not, however, for the enforcement of penalties, or in penal actions, or matters of police, or for the punishment of offenses against the state;⁵ nor

¹ *Bank of Augusta v. Earle*, 13 Pet. 519; *Thompson v. Waters*, 25 Mich. 214.

² *Story's Conf. of Laws*, §§ 36, 38; *Bank of Augusta v. Earle*, 13 Pet. 519; *Saul v. His Creditors*, 5 Martin, (N. S.) 569.

³ *Story's Conf. of Laws*, § 38.

⁴ *Story's Conf. of Laws*, § 38; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 2 Woods, 643; *S. C. 6 Otto*, 1.

⁵ *Story's Conflict of Laws*, § 621; *The Antelope*, 10 Wheat. 66; *Scoville v. Canfield*, 14 John. 338; *State v. Knight*, *Taylor's Law and Eq.* (N. C.) 65.

as to statutory rights of action, or statutory remedies.¹ This comity is not the comity of the courts, though sometimes so called, but is the comity of the state, and is merely administered by the courts, where permitted by the state, as other laws are administered.² In a case cited in the note the ruling is unambiguous and express, that "*comity* extends only to enforce obligations, contracts, and rights under provisions of law of other countries, which are analagous or similar to those of the state where the litigation arises."³

So, too, it was said in Arkansas, that the rule of comity will not be enforced as against domestic law or the legal rights and interests of citizens, or to their injury.⁴ When a government undertakes to enforce or administer laws of other communities, care must be taken that no injury results therefrom to its own citizens.⁵ The municipal laws of a State are of no force in other States, and cannot in other States confer a right. They have no *extra-territorial* force as laws.⁶ But where they enter into a contract they are regarded, and enforced, as a part of the contract, and not as mere laws.

2. **Natural Right.** It is a well settled maxim of the law that "natural right is that which has the same force among all men."⁷ It is written on the hearts of all mankind. Hence it is that there are certain rights and liabilities which, being personal, and founded in natural right, do follow the person of the parties into every country into which they may come. These

¹ Pickering *v.* Fisk, 6 Vt. 102. Justice CHRISTIANCY, in treating this subject in Thompson *v.* Waters, 25 Mich. 214, uses the following language: "But upon the principle of *comity*, which is a part of the law of nations, recognized, to a greater or less extent, by all civilized governments, effect is frequently given in one State or country to the laws of another, in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with, or depending upon, such foreign laws, without which commercial and business intercourse between the people of dif-

ferent States and countries could scarcely exist."

² Bank of Augusta *v.* Earle, 13 Pet. 519; Thompson *v.* Waters, 25 Mich. 214, 240.

³ Hughes *v.* Klingender, 14 La Ann. 857.

⁴ Woodward *v.* Roane, 23 Ark. 523.

⁵ Woodward *v.* Roane, 23 Ark. 523, 527; Olivier *v.* Townes, 2 Mart. (N. S.) 93.

⁶ Milne *v.* Morton, 6 Binn. 365; Hoyt *v.* Thompson, 19 N. Y. 207; Woodward *v.* Roane, 23 Ark. 523, 537.

⁷ Branch's Principia, 69; *Jus naturale est quod apud homines eandem habet potentiam.* 7 Co. 12.

natural rights and liabilities are of the law of nature, and are parcel of the law of nations; they are a species of universal law, and are binding upon, and are recognized and enforced in, the courts of all civilized countries, in times of peace. The enforcement thereof does not depend upon the citizenship or allegiance of the parties, nor upon the place or country in which the right of action accrues, but the same are enforceable in the courts of all other States and countries by implied permission in law, to sue against those thus liable who are there found.

Law of Nations and Universal Law. These principles of natural right and national law are common to the jurisprudence of all countries, as a part of the law of nations, or great communities of states and sovereignties, and are thereby a part of the domestic code of each, and by these the people of each are bound to those of the others, in their personal transactions.

They have grown up as a necessary result of commerce and intercourse between organized governments and courts which are foreign to and independent of each other. They are not mere creatures of comity, enforceable at the will of neighboring states, as matter of favor or good neighborhood, but are of as truly binding authority as are the local laws of each binding on its own citizens, subjects, officers and courts. They are of that part of the law of nations which are not only obligatory upon the sovereign or aggregate community, but are of an inter-state character in the transactions of individuals, and are a necessity as well of the social fabric as of inter-state intercourse, commerce and trade. They are not the creatures of special enactments, but are tacitly acknowledged and enforced in all civilized countries. Nor is the local law anywhere made to give way to their enforcement, for they are themselves a part of the local law by virtue of their universality.¹ In the language of Sir William Black-

¹ *Moultrie v. Hunt*, 23 N. Y. 394, 396. Justice DENIO, speaking in this case of the universal recognition of the title to personal property, says: "Every country enacts such laws as it sees fit as to the disposition of personal property, by its own citizens, either *inter vivos* or testamentary; but these laws are of no inherent obligation in any other country. Still, all

civilized nations agree, as a general rule, to recognize titles to movable property created in other States or countries in pursuance of the laws existing there, and by parties domiciled in such States or countries. This law of comity is parcel of the municipal law of the respective countries in which it is recognized."

stone, these rules of law "result from the principles of natural justice in which all the learned of every nation agree," and are in England adopted to their full extent by the common law, and are held to be the law of the land."¹ Such, too, they were, and still are, in the American States, irrespective of the national Constitution and Union. Though sometimes re-enacted, yet their re-enactment is not regarded as the introduction of new rules of law, but simply as declaratory of these rules of universal and national law, without which, as is well said by the same learned jurist, a state or kingdom would "cease to be a part of the civilized world." * * * "In mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, insurance, bottomry, and others of a similar nature; and in the law merchant, which is a branch of the law of nations, they are regularly and constantly adhered to. So, too, in disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no rule of decision but this great universal law, collected from history and usage, and from such writers of all nations and languages as are generally approved and allowed of."²

"The law of nations," says the same learned author, "is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each."

Among the laws of inter-state general recognition may also be classed the laws of marriage³ and divorce,⁴ by which such as are valid where consummated or obtained are regarded as valid in law in all other states, unless the marriage be polygamous, incestuous, immoral, or otherwise obnoxious to the moral senses of civilization.

Also, the law which requires the movable property of a person

¹ Black.'s Com. Book 4, 67.

² 2 Kent, *92; *Medway v. Needham*,

³ Black.'s Com. Book 4, 67. Wheaton's International Law, §§ 1-17; Woolsey's International Law, §§ 3-5.

16 Mass. 157; *Stephenson v. Gray*, 17 B. Mon. 193.

⁴ *Cheever v. Wilson*, 9 Wall. 108, 123.

who dies intestate to be distributed in accordance with the law of the country wherein was his *domicile* at the time of his death, irrespective of where the property may be, or of the place at which he may die; and which always regards movable property as disposable according to the law of the owner's domicile.¹

And, the equally well recognized principle that contracts valid by the law of the place where they are made, or *lex loci contractus*, are valid in every other country or State. The exceptions to this rule will be noticed hereafter, under the proper head in relation to contracts.² So, also, we will notice others, under their proper order.

¹ *Ennis v. Smith*, 14 How. 400, 465, 466.

² Story on Conf. of Laws, § 273; *Nelson v. Fottrell*, 7 Leigh. 201; *Warder v. Arell*, 2 Wash. (Va.) 282, 295. In this case, one of the earliest American decisions on the subject, the Court of Appeals of Virginia, ROANE, J., say: "This contract having been made in Pennsylvania, without a view to performance in any other State, the agreement made upon the trial of the cause, referring to those laws, was an act of supererogation, and entirely unnecessary, for it is clear that the laws of that country where a contract is made must govern the fate of it. The rule which I have just mentioned is laid down in the case

of *Robinson v. Bland*, 2 Burr. 1679, and is well explained and illustrated in Fonblanque's excellent 'Treatise of Equity,' 2 vol. p. 443. It is true that the laws of one country have not, of themselves, an extra-territorial force in another; but, by the general assent of nations, they are always *regarded*, in contracts formed there. A distinction, however, is attempted in this case, under the idea that this is a penal law, and that the courts of one country will never execute the penal laws of another. The principle is true, but inapplicable. The law of 1777 points out a mode of discharging debts different from that which is customary; it may produce an injury, but it is not therefore penal."

CHAPTER III.

CORRELATION OF GOVERNMENT — CITIZENSHIP AND ALLEGIANCE —
STABILITY OF STATES.

- I. STATE AND NATIONAL SOVEREIGNTY. DUALITY AND UNITY OF GOVERNMENT.
- II. CITIZENSHIP AND ALLEGIANCE.
- III. SUITS BETWEEN TWO OR MORE STATES.
- IV. SUIT AGAINST A STATE BY A CITIZEN OF ANOTHER STATE.

1. **State and National Sovereignty. Duality and Unity of Government.** We will now proceed under this and the subsequent heads of the present chapter, to treat somewhat of the correlation of our government and courts; in doing which, being aware of the difficulty of the task, and of the sacred ground on which we tread, we will carefully confine ourselves to the law of adjudicated cases. We will endeavor to regard our complex, yet beautiful, system of interwoven State and national sovereignties and jurisprudence, not as embodying any actual conflict of law, but rather as an harmonious whole, composed of so many independent, yet kindred, parts, each moving in its own proper sphere, and not necessarily impeded, or interfered with, by the others, believing as we do, that if conflict occurs it is by reason of one or more of them departing from their proper spheres of action.¹ The true line of demarcation between the respective powers of State and national courts is not always very perceptible or easily defined, but, for that very reason, it devolves upon both to be cautious in the exercise of doubtful authority.²

Paramount Authority of National Courts. Whenever a question of paramount jurisdiction arises, the national courts are, in

¹ *Ex parte Holman*, 28 Iowa, 88. Per DILLON, J.: "Each court must keep within its own orbit." *Id.* p. 112. *Cohens v. Virginia*, 6 Wheat. 264, 419. In this case, our great and eminent

jurist, Chief Justice MARSHALL, says: "The national and State system are to be regarded as one whole." ² *Railroad Company v. Husen*, 5 Otto, 465, 470, 474.

the very nature of things, as well as by the provisions of the Constitution, the supreme arbiters thereof.¹

In the case of *Railroad Company v. Husen*, the learned Judge STRONG, realizing that imperfectness which is common to all created things, and therefore as affording no argument against the value of our duplex system of government, says, in relation to one of those respective powers: "What that power is, it is difficult to define with sharp precision, * * * and as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."² The same may be said, with equal propriety, in reference to all doubtful questions incident to our governmental system. The line of approach must be carefully kept in the foreground, and any intrusion thereon most vigilantly avoided.

Unity and Duality of Our Government. Though the citizens of the several States are one people and one nation, under the unity of the national government as the supreme authority within the limitations of the Constitution,³ yet the States themselves are severally sovereign, independent, and foreign to each other, in regard to their internal and domestic affairs.⁴ Such being the case, it results therefrom that the State constitutions and laws have no *extra-territorial* force, anywhere, except as conceded to them by mere comity.⁵ Were it otherwise, their condition would be incompatible with State sovereignty and independence of each other, inasmuch as the extra-territorial force of the laws of one within the territorial boundaries of an-

¹ *Pensacola Telegraph Co. v. Western Union Tel. Co.*, 6 Otto, 1 and 10.

² 5 Otto, 470, 474.

³ *McCulloch v. Maryland*, 4 Wheat. 316; *Dodge v. Woolsey*, 18 How. 336, 347; *Lonsdale v. Brown*, 4 Wash. C. C. 86; *Buckner v. Finley*, 2 Pet. 586; *Bank of U. S. v. Daniel*, 12 Pet. 32; *Rhode Island v. Massachusetts*, 12 Pet. 657; *Warder v. Arell*, 2 Wash. (Va.) 282, 298; *U. S. v. Reese*, 2 Otto, 214, 217; *U. S. v. Cruikshank*, 2 Otto, 542, 550; *Crandall v. Nevada*, 6 Wall. 35, 43; *Cohens v. Virginia*, 6 Wheat. 414, 419.

⁴ *Cohens v. Virginia*, 6 Wheat. 414; *McIlvaine v. Coxe*, 4 Cr. 209; *Bank of the U. S. v. Daniel*, 12 Pet. 32; *U. S. v. Cruikshank*, 2 Otto, 542, 550; *Buckner v. Finley*, 2 Pet. 586; *Pennoyer v. Neff*, 5 Otto, 714.

⁵ *Bank of Augusta v. Earle*, 13 Pet. 519; *Blanchard v. Russell*, 13 Mass. 1; *Kentucky v. Bassford*, 6 Hill, 527; *Seymour v. Butler*, 8 Iowa, 304; *Pennoyer v. Neff*, 5 Otto, 714; *Cleveland. Painesville & Ash. R. R. Co. v. Pennsylvania*, 15 Wall. 300; *Foster v. Glazener*, 27 Ala. 391.

other, would be common alike to all, and none would be either sovereign or independent in their accustomed domestic and internal affairs.

But notwithstanding this sovereignty of the several States, within their territorial limits, yet that sovereignty is limited and restricted therein by the national Constitution; for the powers of the States and of the national government, both exist, and are exercised, within the territorial limits of the respective States, as separate and distinct sovereignties, acting separately and independently of each other within their respective spheres, and making therein a duality of government.¹ But the sphere of action of the national government is as far beyond the judicial powers of the State courts, as if the divisional line of power was marked out by land-marks and boundaries visible to the eye, and sensible to the touch. And so are the processes of each within their spheres of action. Neither may intrude upon the other; within their proper limits or spheres of power and authority neither is responsible to the other; but in cases of conflict of authority, if any such occur, the authority of the United States is supreme over all, so far as is necessary to sustain and preserve the rightful supremacy of the national Constitution, courts and laws.² This power results to the Federal courts from the fact that the Constitution of the United States, and the laws passed in pursuance thereof, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding."³ If conflicts of power or jurisdiction unhappily arise, the national

¹ *Pennoyer v. Neff*, 5 Otto, 714; *In re Steamboat Josephine*, 39 N. Y. 19, 24.

² *Tarble's Case*, 13 Wall. 397, 406, 407; *U. S. v. Keokuk*, 6 Wall. 514, 516; *Riggs v. Johnson Co.*, 6 Wall. 166, 195, 196; *Duncan v. Darst*, 1 How. 301, 310; *The Moses Taylor*, 4 Wall. 411; *Sinnot v. Davenport*, 22 How. 227; *Pennoyer v. Neff*, 5 Otto, 714, 733; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 6 Otto, 1 and 10. In the case last cited the United States Supreme Court say: "The govern-

ment of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another, upon the national rights which belong to all."

³ 14th amendment; *Tarble's Case*, 13 Wall. 397, 406; *Sinnot v. Davenport*, 22 How. 227; *Pennoyer v. Neff*, 5 Otto, 714, 733.

authority has supremacy, and the questions are to be decided by national courts.¹

Concurrent Jurisdiction. Where there is concurrent power in the courts, as on some subjects there is, the general rule of law is that the tribunal which first obtains jurisdiction of the subject matter of the suit or particular case, will retain and dispose of it; but to this there is the exception which allows certain suits to be removed from the State courts to the circuit courts of the United States.²

Opposing Process. And so where processes from different courts, State and Federal, are attempted to be levied upon property of a common defendant, the first levy accompanied with actual possession places the property in legal custody, and will be respected.³

If this rule of law be violated, and property levied on and reduced to possession, by the Marshal of the United States, on process from a United States court, be taken out of his possession by a sheriff, on the process or orders of a State court, the remedy therefor, of the Marshal, or plaintiff in the writ under which he held the property, is not by injunction from the United States court to restrain the illegal interference simply as such, but the remedy is at law, by action of trespass against the sheriff, or by an attachment against that officer from the United States court, to enforce the proper deference to its process and authority.⁴

And, upon the same principle, money in the hands of an officer of the United States, and which he holds for purposes of disbursement under the national law, cannot be reached by garnishee process from a State court, in behalf of a creditor of one to whom such money is, by law, about to be paid.⁵ Thus, where a purser

¹ Tarble's Case, 13 Wall. 397, 407; U. S. v. Keokuk, 6 Wall. 514; Riggs v. Johnson Co., 6 Wall. 166; The Moses Taylor, 4 Wall. 411; Sinnot v. Davenport, 22 How. 227; Pensacola Telegraph Co. v. Western Union Telegraph Co., 6 Otto, 1, 10.

² Shelby v. Bacon, 10 How. 56; Green v. Creighton, 23 How. 90; Peale v. Phipps, 14 How. 368; Riggs v. Johnson Co., 6 Wall. 166, 196; *Ex parte*

Holman, 28 Iowa, 88, 105; Chittenden v. Brewster, 2 Wall. 191, 197; Smith v. McIver, 9 Wheat. 532.

³ Taylor v. Cary, 20 How. 583, 594; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Hagan v. Lucas, 10 Pet. 400.

⁴ Cookendorfer v. Preston, 4 How. 317.

⁵ Buchanan v. Alexander, 4 How. 20.

in the United States Navy held moneys payable to certain seamen as wages, was garnished, by State process, at the suit of a boarding-house keeper, to whom such seamen were indebted for board, the Supreme Court of the United States held that the money was the money of the government until paid over by the purser, and therefore the process of garnishee would not lie, and also for the reason that such proceeding is calculated to obstruct or suspend the functions of government, for that, if allowable, it might equally extend to all the monetary relations of the government and its distributing agents.¹

So goods imported, but not yet entered in a custom house of the United States, are not liable to attachment or other State process against them or their owner. They are in the custody of the United States, and can only be removed from such custody by the persons, and in the manner, contemplated by the acts of Congress. Every proceeding interfering with, or disturbing that custody, is unlawful.²

The first levy of goods and chattels, whether under State or Federal process, places the property in the custody of the law, and withdraws it from liability to the process of the other. By the levy a special property in the goods is vested in the officer, and he may maintain an action for them, if deprived of their custody. Hence two levies under different authorities are incompatible, for the property cannot, at the same time, vest in both the officers.³

Several Executions held by the Same Officer, or by Different Officers. An officer levying and having two or more executions, against the same defendant, if no legal preference attach to either, may levy both upon the same goods, and, there being no priority on either, the proceeds will be proportionately applied on both (or, if there be priority, the court, if requested, may apply the funds); and, if a levy has first been made on one writ, and another comes afterwards into an officer's hands, he may apply any surplus proceeds, after satisfying the first, upon the latter writ.⁴

But, in case the writs are held by different officers, this becomes, in a manner, impracticable, and more especially so where

¹ *Buchanan v. Alexander*, 4 How. 20.

² *Harris v. Dennie*, 3 Pet. 202.

³ *Hagan v. Lucas*, 10 Pet. 400; *Brown*

v. Clarke, 4 How. 4; *Freeman v. Howe*, 24 How. 450.

⁴ *Hagan v. Lucas*, 10 Pet. 400, 403.

the writs and the officers represent and rest for their authority upon different jurisdictions, as where one is an officer of a State court and the other an officer of a Federal court, and each holding a writ or writs against the same execution defendant.¹

Exempt Property, if Levied on, Recoverable by Suit. Though property levied on lawfully by an officer of a United States court cannot be levied on by State process while thus in the hands of the Marshal, yet it has been held that, if the levy be illegal or wrongful, as where the property levied on execution is exempt by law from execution, levy and sale, that the debtor owner of the property may maintain an action in the State court, against the Marshal personally, for the property.²

The Jurisdiction first Attaching Controls. Where a State or a Federal court first obtains jurisdiction of a subject matter of litigation, of which these courts have concurrent jurisdiction in law, the court in which jurisdiction thus actually attaches, draws to itself all the attributes of the case, and is entitled to exclusive control and jurisdiction to determine and dispose of the whole case. Therefore, if the defendant therein be subsequently impleaded, of the same subject matter in a State court, he may successfully plead the pendency of the proceedings in the Federal court in bar of the action or proceedings in the State court.³ And if he be sued as a trustee, he is bound so to plead, or else account for any loss that occurs from omitting such duty.⁴

Therefore, in cases within the *concurrent* jurisdiction of the State and national courts, where jurisdiction first attaches over the subject matter of the particular case, in the Federal court, the defendant therein, if sued afterwards, in the same matter, in a State court, may plead the pendency of the suit in the Federal court in bar of the action in the State court, and such plea is effectual in law. If the ruling in the State court be against the validity of the plea, then the defendant has a remedy by writ of error or appeal, as the case may be, to the Supreme Court of the United States, under the twenty-fifth section of the judiciary act.⁵

So, where an assignee, for the benefit of an insolvent's creditor, is first brought into a United States court, by a bill in

¹ Hagan v. Lucas, 10 Pet. 400.

² Gilman v. Williams, 7 Wis. 329.

⁴ Ibid.

³ Chittenden v. Brewster, 2 Wall.

⁵ Ibid.

equity to set aside the assignment as fraudulent, filed therein before the institution of any proceeding against him, on the same subject, in a State court, and after being thus impleaded in the Federal court, he is sued in a State court in reference to the same subject matter, he may not only thus defend, successfully, by pleading to the latter proceeding the pending suit in the Federal court, but is bound so to do, or else be held responsible in the Federal court for the consequences, or losses, incurred to the trust fund by omitting so to do.¹

In Cases of Conflict United States Supreme Court the Arbitrator. The ultimate decision in cases of conflict, or doubtful right, as to the correlative powers of the Federal and State courts, is the appellate power of the Supreme Court of the United States; in all matters touching these powers, the decision of this tribunal, within the pale of its jurisdiction, is supreme.²

State courts have no control whatever over the officers and agents of the national government, as to the discharge of their duties or powers, and cannot by writs of mandamus enforce performance of acts pertaining thereto,³ nor restrain the same by injunctions.⁴

In *Ex parte McNeil*, the Supreme Court of the United States, speaking of these correlative powers of the Federal and State governments, and the regulation thereof, say: "In the complex system of polity which prevails in this country, the powers of government may be divided into four classes. Those which belong exclusively to the States. Those which belong exclusively to the national government. Those which may be exercised concurrently and independently by both. Those which may be exercised by the States, until Congress shall see fit to act upon the subject. The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur."⁵ In illustration of these principles, that court holds that the commercial power vested in Congress by the Constitution is partly of this last character. That some of the rules necessary in the regulation of that subject, from the nature of things, must be uniform throughout the country; and that to that extent the

¹ *Chittenden v. Brewster*, 2 Wall. 191.

² *McClung v. Silliman*, 6 Wheat. 598.

³ *Ex parte Holman*, 28 Iowa, 88.

⁴ *Riggs v. Johnson Co.*, 6 Wall. 166.

⁵ 13 Wall. 236.

power to make them must necessarily be exclusively in Congress, as clearly so as if expressly declared. That others may be allowed to vary, with varying circumstances and differences of locality. That in the latter cases, the States may prescribe the rules to be observed, until Congress shall supersede them by its own enactments, made in virtue of the national Constitution, which is the supreme law.¹

Injunctions. State courts cannot, by injunction or otherwise, stay or arrest the processes, or jurisdiction, of a United States court, or in any manner interfere therewith. It is not by reason of paramount jurisdiction of the Federal courts that this cannot be done, but because in their sphere of action the Federal courts are independent of the State tribunals.² So, for the same reason, State courts are exempt from all interference of the Federal tribunals.³ The United States circuit courts, and the State courts, act separately and independently of each other, and, in the language of the United States Supreme Court, "in their respective spheres of action, the process issued by the one is as far beyond the reach of the other as if the line of division between them was traced by land-marks and monuments visible to the eye."⁴ This, too, although their action be within the same territorial limits.

Relative Powers. The national Constitution has clearly and wisely defined the respective spheres of these State and national judiciaries, and their relative subordination to, or supremacy of, each other, by an express grant of the powers of the national courts, thereby indicating with equal clearness and wisdom those appertaining to the courts of the States, in this, that by the same instrument it is declared that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."⁵

This clause evidently refers as well to judicial powers as to others, and the deduction therefrom is that when the judicial

¹ *Ex parte McNeil*, 13 Wall. 236.

² *Riggs v. Johnson Co.*, 6 Wall. 166; *Ex parte Holman*, 28 Iowa, 88; *Diggs v. Wolcott*, 4 Cr. 178 (such procedure is prohibited by act of Congress, 1 Stat. at Large, 335); *Duncan v. Darst*, 1 How. 301; *Peck v. Jenness*, 7 How. 612, 625; *The Mayor v. Lord*, 9 Wall.

409, 414; *The Supervisors v. Durant*, 9 Wall. 415; *U. S. v. Peters*, 5 Cr. 115.

³ *Riggs v. Johnson Co.*, 6 Wall. 166; *Ex parte Holman*, 28 Iowa, 88.

⁴ *Riggs v. Johnson Co.*, 6 Wall. 166, 195, 196.

⁵ 10th Amendment to the Constitution.

powers which, by the Constitution, are expressly granted to the United States courts, are stated and enumerated, then all other rightful judicial powers of republican governments are to be recognized as remaining with the States, and are in the courts thereof, respectively, so far as their exercise has been authorized by the respective State legislatures and constitutions; or unless modified or restricted by some express prohibition of the Constitution of the United States.

To enumerate these grants, then. By Section 2 of Article III. of the Constitution, it is declared that: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or citizens thereof, and foreign States, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases, before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

Here, then, is the extent of the national judicial power. All else, except where prohibited, remains in the States; and except such, if any, as may be conferred by subsequent constitutional amendments. How this grant of power has been distributed by Congress, among the several national courts, is not material to this treatise, other than in a general way, as our more immediate purpose is to treat of the inter-State relation and distribution of the judicial powers, as between the State and national judiciaries, and also, as to the inter-State relations of the several States themselves, and their courts, toward each other, and not to the practical or administrative exercise thereof by the courts of either the one or the other, further than may incidentally become necessary in prosecuting the main purpose of this work.

Domestic Character of Judgments. Judgments of the national courts are not foreign to the courts of the respective districts, nor are they foreign in their relation to the courts of the several States; but are domestic and homogenous throughout the nation, in like manner as those of the State courts are throughout the States in which they are rendered.¹

The judgments, decrees and proceedings of the national courts prove themselves everywhere by the seal of the court from which they emanate, and need no such additional authenticity as the judge's certificate, or other evidence of their genuineness, than a certificate of the clerk and the seal of the court. These are *prima facie* evidence of their validity in all other American courts, State and national. They do not come within the provisions of Section 1 of the 4th Article of the Constitution, or the act of Congress relative to the authentication of records and judicial proceedings of the several States, in each State, but are of themselves entitled to full faith and credit in every State and Territory, and wherever our national jurisdiction extends, and in every department thereof.²

In like manner the records and proceedings of the State and Territorial courts, certified and authenticated by the clerk, and seal of the court, so as to give them authenticity in the courts of the same State, will also give them authenticity and credit in the courts of the United States, without the particular authentication prescribed by act of Congress in respect to their authentication for use in the courts of another State; for the act of Congress in that respect is not applicable to the records and proceedings certified from a State to a Federal court, these courts not being foreign to each other, as the State courts of the different States are.³

Trial by Jury. Private Property for Public Use. The provision of the United States Constitution that secures the right of

¹ *Ex parte* Schollenberger, 6 Otto, 369, 376, 379, may be cited as bearing upon this subject.

² Article 4, Cons. U. S.; Thomson v. Lec Co., 22 Iowa, 206; Reed v. Ross, 1 Bald. C. C. 36; Niblet v. Scott, 4 La. Ann. 245; St. Albans v. Bush, 4 Vt. 58; Barney v. Patterson, 6 Harr. & J. 182; U. S. v. Wood, 2 Wheeler's Cr.

Cases, 326; Murray v. Marsh, 2 Hayw. (N. C.) 290; Buford v. Hickman, Hempst. 232; Mason v. Lawrason, 1 Cr. C. C. 190; Mewster v. Spalding, 6 McLean, 24; Bennett v. Bennett, Deady, 299; Dean v. Chapin, 22 Mich. 275.

³ Mewster v. Spalding, 6 McLean, 24; Bennett v. Bennett, Deady, 299.

trial by jury, has reference to trial in courts of the United States, and not to those of the several States.¹ Likewise the provision that private property shall not be taken for public use, without compensation therefor. This inhibition binds the Federal government only, and is not obligatory upon the governments of the States.² In the case here referred to, of *Barron v. Mayor, etc., of Baltimore*, the Supreme Court of the United States, MARSHALL, C. J., say: "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated."³

2. **Citizenship and Allegiance.** The Constitution of the United States declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.⁴

This amendatory declaration but reflects the prior annunciations of the Supreme Court, in respect to the citizens of the United States being, in virtue thereof, citizens of the States in which they reside.⁵ In the case here cited, of *Gassies v. Ballou*, the party alleged that he was a naturalized citizen of the United States, and resided in the State of Louisiana. The allegation was held to be equivalent to an averment direct that the party making it was a citizen of the State of Louisiana. MARSHALL, Ch. J., in delivering the opinion of the court, said: "A citizen of the United States, residing in any State of the Union, is a citizen of that State."⁶ Thus the citizenship of the State, where resident, is recognized as flowing from that of citizenship of the United States, both by the Federal ruling of the Supreme Court, and by the Constitution as subsequently amended, being a reflex of the unity of government and national supremacy referred to in the preceding section of this chapter. Or, as Chief Justice

¹ Proffatt on Trial by Jury, § 83; *Livingston v. Mayor of New York*, 8 Wend. 85, 100; *Colt v. Eves*, 12 Conn. 243.

² *Barron, etc. v. Mayor, etc., of Baltimore*, 7 Pet. 243.

³ 7 Pet. 247.

⁴ Article 14, § 1, of Amendments to the Constitution.

⁵ *Gassies v. Ballou*, 6 Pet. 761.

⁶ *Ibid.*

MARSHALL expresses it, "The national and State system are to be regarded as one whole." This supremacy and sovereign unity of government, in a national point of view, is still more strongly indicated in the oath of allegiance required by law of Congress to be administered to persons when being naturalized. The sworn allegiance is that he will support the Constitution of the United States, and not of any State.

3. **Suits between Two or More States.** In suits between two States, involving a civil controversy, the Constitution vests the jurisdiction exclusively in the Supreme Court of the United States.¹

Such jurisdiction is limited to civil controversies, as contradistinguished from those of a political nature. It is necessary that some right of property, or pecuniary interest, or value, be involved for determination of the court. Mere political interests or questions will not, alone, confer jurisdiction, for such are not the subject of judicial investigation or control, as has been shown in Chapter I. of this work. The political right to be a State cannot be determined in any court. Such questions do not come within the compass of judicial authority, but are to be determined by the political departments of the government. So, in regard to the right of a State to be a member of the American Union. In all these cases, the action of the political departments — the President and Congress of the United States — determines the matter, and will be accepted and conformed to by the courts, as a finality. But where the proper element of jurisdiction is present in a cause, jurisdiction thus far will not be prevented by the presence of political elements.²

¹ § 2, Art. 3, Cons. of U. S.; Rhode Island *v.* Massachusetts, 12 Pet. 657.

² Georgia *v.* Stauton, 6 Wall. 74; Georgia *v.* Johnson, 4 Wall. 500; Rhode Island *v.* Massachusetts, 12 Pet. 657, 755; New Jersey *v.* New York, 3 Pet. 461, and 5 Pet. 284; Kentucky *v.* Ohio, 24 How. 66; Florida *v.* Georgia, 17 How. 478; Missouri *v.* Iowa, 7 How. 660, and 10 How. 1; Cherokee Nation *v.* Georgia, 5 Pet. 1; Fellows

v. Blacksmith, 19 How. 366; Foster *v.* Neilson, 2 Pet. 253; Garcia *v.* Lee, 12 Pet. 511; Williams *v.* Suffolk Ins. Co., 13 Pet. 415; Luther *v.* Borden, 7 How. 1; Scott *v.* Jones, 5 How. 343. The State must be a party on the record. Osborn *v.* Bank of U. S. 9 Wheat. 738. But a suit against a governor of a State, as such, answers this requirement. Governor of Georgia *v.* Mandrazo, 1 Pet. 110.

4. **Suit Against a State by a Citizen of Another State.** Upon general principles, a sovereign State cannot be sued, unless by consent.¹

The second section of the third article of the national Constitution, however, as originally adopted, rendered the States suable, not only as against each other, but at the suit of citizens of other States, and vested jurisdiction of such cases in the Supreme Court.² But, by subsequent amendments of the Constitution, the suing of a State in the courts of the United States is entirely inhibited, except in cases of suits between two or more States.³ Thus the right of one State to sue another still remains, and the jurisdiction of such suits is *exclusive* in the Supreme Court, as we have seen in the preceding section of this chapter.

¹ *Beers v. Alabama*, 20 How. 527; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Bank of Washington v. Arkansas*, 20 How. 530.

² Art. XI. of Amendments to the Constitution of the U. S.

³ *Hollingsworth v. Virginia*, 3 Dall. 378.

CHAPTER IV.

INTER-STATE RIGHTS OF SUIT — JURISDICTIONAL REQUISITES.

- I. A CONSTITUTIONAL RIGHT, AS WELL AS BY COMITY.
- II. PERSONAL JURISDICTION: WHEN NECESSARY.
- III. PROCEEDINGS IN REM.
- IV. SEALED AND UNSEALED INSTRUMENTS.
- V. NON-RESIDENTS PERSONALLY SUABLE IF FOUND AND SERVED.
- VI. JURISDICTION OBTAINED BY FRAUD.
- VII. FOREIGN CORPORATIONS, EXECUTORS AND ADMINISTRATORS.
- VIII. SERVICE ON A MEMBER OF A FIRM AS AGAINST A NON-RESIDENT MEMBER THEREOF.

1. **A Constitutional Right, as well as by Comity.** Not only as matter of comity, which under the unity of our national government may not be withheld, but also in virtue of the 2d section of the 4th article of the Constitution, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and which adds to comity an absolute and binding law, the citizens and inhabitants of each State have a right to sue, and are liable to be sued, in the courts of all the States, in all such actions and suits in law and in equity as in their nature come within the sphere of inter-State jurisdiction.¹

2. **Personal Jurisdiction: When Necessary.** But to sustain a personal judgment against a defendant, personal jurisdiction must be had, either by appearance or by personal service of process, made within the territorial limits of the State where suit is brought; and non-residence is no objection to such jurisdiction where personal service is thus made.²

Personal Jurisdiction, Is not attainable in the courts of one State against a citizen or resident of another State by personal

¹ Story on the Constitution, §§ 1805, 1806; Cooley's Const. Lim. *15, and Note 4, *16.

² Swan v. Smith, 26 Iowa, 87; Board of Public Works v. Columbia College, 17 Wall. 521. But judgment

without jurisdiction is void. Griffith v. Frazier, 8 Cr. 9; Schwinger v. Hickok, 53 N. Y. 280; Freeman on Judgments, §§ 564, 566; Lawrence v. Jarvis, 32 Ill. 304.

service of process made in such other and different State than the one in which suit is sought to be brought, and a personal judgment rendered against a defendant who has not personally appeared, or otherwise submitted to the jurisdiction of the court, and upon whom no other service of process than the above has been made, is null and void; for the processes and laws of a State have no *extra-territorial* operation or force as against citizens or persons residing in a different State.¹ Nor will personal jurisdiction be obtained by publication of notice in newspapers, or other publication of notice against or to such non-resident or absent defendant, so as to justify or sustain a personal judgment against him, but such personal judgment, rendered without other jurisdiction of the person of the defendant than publication, is null and void, as well where rendered as elsewhere, notwithstanding any law of the *forum* authorizing the same; for such law can have no *extra-territorial* force to affect the defendant personally outside the jurisdiction of the State wherein the judgment is rendered.²

3. *Proceedings in rem.* But proceedings *in rem*, may, for any just cause, be prosecuted against the property of a non-resident, situated in any State, by proceedings in the courts of the State wherein the property is situated, if so allowed by law, upon such publication of notice, or constructive service, as is the practice of such State, and judgment against the property may be rendered accordingly, when otherwise justified in law; for such property being within the actual jurisdiction of the *forum*, the power of the State and its courts over the same does not depend upon personal service and jurisdiction of the defendant's person;³ but no personal judgment, in such proceeding, there hav-

¹ *Bates v. Chicago, and N. W. R. R. Co.*, 19 Iowa, 260; *Hakes v. Shupe*, 27 Iowa, 465; *Weil v. Lowenthal*, 10 Iowa, 575; *Ableman v. Booth*, 21 How. 506; *Piatt v. Oliver*, 2 McLean, 268; *Westervelt v. Lewis*, *Ibid.* 511; *Lincoln v. Tower*, *Ibid.* 473; *Kendall v. U. S.*, 12 Pet. 526; *Herndon v. Ridgeway*, 17 How. 424; *Griffith v. Frazier*, 8 Cr. 9; *Freeman on Judgments*, §§ 564, 566.

² *Banta v. Wood*, 32 Iowa, 469; *Bates v. Chicago & N. W. R. R. Co.*,

19 Iowa, 260, 262; *Board of Public Works v. Columbia College*, 17 Wall. 521; *Griffith v. Frazier*, 8 Cr. 9; *Schwinger v. Hickok*, 53 N. Y. 280; *Bischoff v. Wethered*, 9 Wall. 812; *Freeman on Judgments*, § 127; *Storey's Conf. of Laws*, §§ 546 and 546a.

³ *Darrance v. Preston*, 18 Iowa, 396; *Banta v. Wood*, 32 Iowa, 469; *The Globe*, 2 Blatchf. 427; *Thomas v. Southard*, 2 Dana, 475.

ing been only such constructive service, will be valid, and no recovery in an action can be had thereon, anywhere.¹ So the same right and liability, of suing and being sued in the circuit courts of the United States, exists between citizens of different States, where the amount in controversy, and citizenship of the parties, or other legal requisites, are shown, which bring the same within the jurisdiction of said court. But to sustain a judgment *in personam*, personal service must be had, and a citizen of one State cannot be arrested, in any case, on civil process from such circuit court in a different State than that wherein he resides.²

4. **Sealed and Unsealed Instruments.** Interesting questions sometimes arise as to the character in which an instrument made in one State, and sued on in the courts of another, is to be regarded in the forum of the latter State; as, for instance, the question as to whether an instrument is sealed or not, will govern the nature of the action brought thereon.

Thus, in some States a mere scroll is by law given the import and force of an actual seal; in others an actual or real seal is required, as an impression on wax, or other impressible substance; and yet, in others still, seals are abolished entirely.

Now, in an action on such instruments in the courts of the State where made, no difficulty may arise in relation to their true character; but when sued on in the court of a different State, where the rule of local law as to a seal varies from that where the instrument was made, the question arises at once as to whether the local law, that is the law of the *forum*, shall prevail, or that of the State wherein the instrument was made, shall govern in giving character to it, as a sealed or an unsealed instrument—for, if a sealed instrument, it is a deed, or writing obligatory, and suit must be in covenant or debt, but if unsealed, then it is but a simple contract, and *assumpsit* will lie. The Supreme Court of the United States hold that, notwithstanding the general law, the *lex loci contractus* governs as to the obligation and character of an instrument, when not made performable elsewhere; that nevertheless, without impairing the obligation

¹ *Boswell v. Otis*, 9 How. 336; *Lincoln v. Tower*, 2 McLean, 473; *Warren Manf. Co. v. Etna Ins. Co.*, 2 Paine,

502; *Westervelt v. Lewis*, 2 McLean, 511; *Banta v. Wood*, 32 Iowa, 469.

² See Revised Statutes of U. S. of 1874, p. 139, § 739.

of that rule, in enforcing a remedy on it elsewhere, the law of the *forum*, or place where the suit is brought, prevails, and it is to be treated as *sealed* or *unsealed* accordingly as it would be if made in the State where the suit is pending.¹

Thus, the law of New York requires an actual seal of wafer or wax,² and, if not so sealed, the form of action on an instrument is *assumpsit*.³ By the law of Wisconsin, it is provided that "any instrument to which the person making the same shall affix any device, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed." In an action in the Circuit Court of the United States for the Southern District of New York, upon an instrument made in Wisconsin, with a view to performance in Wisconsin, as, for instance, a deed of warrantee for Wisconsin lands, suit being brought on the warranty, the action was brought in *assumpsit*, according to the practice on simple contracts in New York, and it was held that the action was rightfully brought, as to the form thereof, and, the case having gone to the Supreme Court of the United States, that court affirmed the ruling in that respect.⁴ The Supreme Court of the United States, WOODBURY, J., say of the form of action: "It was obliged to be in *assumpsit* in the State of New York. * * * We hold this, too, without impairing at all the principle that in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern."⁵

5. Non-residents Personally Suable, if Found and Served.

It is no objection to the jurisdiction of a State court over the person of a defendant, that he resides in a different State, provided personal service be had upon such defendant in the State where the action or suit is brought, and provided the nature of the action or suit, and the subject-matter thereof, be such as is actionable in that jurisdiction, or may therein be enforced.⁶ Every citizen or resident of a State or territory is liable to suit, *in personam*, in every other State and territory wherein he may

¹ Robinson v. Campbell, 3 Wheat. 212; Le Roy v. Beard, 8 How. 451; Meredith v. Hinsdale, 2 Caines, 362.

² Warren v. Lynch, 5 John. 239.

³ Andrews v. Herriott, 4 Cow. 508; Van Santwood v. Sandford, 12 John.

198; Bank of Rochester v. Gray, 2 Hill, 228.

⁴ Le Roy v. Beard, 8 How. 451.

⁵ Le Roy v. Beard, 8 How. 464, 465; Robinson v. Campbell, 3 Wheat. 212.

⁶ Swan v. Smith, 26 Iowa, 87; Freeman on Judgments, § 566.

be found and served with personal notice, on causes of action arising in such State, as also in actions of such a transitory nature that suits may be maintained thereon in the courts of a different State than that wherein the right of action accrued; as, for instance, such causes of action as follow the person of a debtor, or other defendant, as contradistinguished from those of a local character, rendered so by their relation to local things, or by growing out of and dependent upon local statutes, in the State where the cause of action arises other than that wherein the defendant is sued.¹

§ 6. **Jurisdiction Obtained by Fraud.** But jurisdiction obtained by fraud is invalid, as where, if by false or fraudulent means, a party is induced to come from another State into the jurisdiction of the court, in order to procure service on him in a judicial proceeding, the court will set the service aside on motion and proof of the improper means thus used.²

Service on a Non-resident, if a Witness. And so, if jurisdiction be obtained of the person of a defendant who is resident of another State, by personal service of process in a suit against him, made upon him whilst attending within the State where thus sued as a witness in a cause pending in the courts of such State, the service of such process will be set aside upon proper application; for it is the policy of the law to protect suitors and witnesses from service of process in civil actions, whether the process be such as required their arrest, or be merely in the nature of a summons. Service in such cases will be set aside, as well upon *general* principles as upon positive law, if there is such.³

7. Foreign Corporations, Executors, and Administrators. It is not definitely settled whether a corporation may be sued by service on its officers or agents doing business in another State.⁴ The ruling in Missouri is that a private corporation, incorporated under the laws of another State, is not liable to be sued personally, within the State of Missouri, by ordinary process of sum-

¹ Story's Conf. of Laws, § 538.

² *Carpenter v. Spooner*, 2 Sandf. 717; *Wanzer v. Bright*, 52 Ill. 35.

³ *Person v. Grier*, 66 N.Y. 124; *Norris v. Beach*, 2 John. 294; *Sanford v. Chase*, 3 Cow. 381; *Hopkins v. Coburn*, 1 Wend. 192; *Seaver v. Robinson*, 3 Duer, 622; *Merrill v. George*, 23 How.

Pr. 331; *Halsey v. Stewart*, 4 N. J. 366; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Parker v. Hotchkiss*, 1 Wall. jr. 269.

⁴ *St. Louis v. Wiggins Ferry*, 40 Mo. 580; *Angel and Ames on Corp.* §§ 402-407.

mons, unless such foreign corporation has its chief office or place of business in said State of Missouri; and that, if such chief office and place of business be not therein, then proceedings against such foreign corporation can only be had *in rem*, as by process of attachment.¹ So executors and administrators are not subject to an action or suit against them in their fiduciary capacity in the courts of a State other than the State wherein their authority is granted to them.²

8. **Service on a Member of a Firm as Against a Non-resident Member Thereof.** Service is not good against a non-resident defendant by being made upon a member of a firm, of which firm defendant is also a member; nor is it good against the firm, so as to authorize a declaration and proceeding against the firm, where the *præcipe* and writ show the origin of the action to be against a natural person as defendant. By such a proceeding and service no jurisdiction of the person of the real defendant is obtained, and no cause is legally instituted, or brought into legal existence, against the firm, upon which to sustain an action or judgment.³

¹ Middough v. St. Jos. & Den. R. R. Co., 51 Mo. 520; Same case, 3 Am. Rw. Reps. 461; Farnsworth v. Terre Haute, etc., R. R. Co., 29 Mo. 75; St. Louis v. Wiggins' Ferry Co., 40 Mo. 580; Robb v. Chicago & Alt. R. R. Co., 47 Mo. 540. This subject will receive fur-

ther treatment. See *post*, Chap. 25, § 3.

² Vaughan v. Northup, 15 Pet. 1; Fenwick v. Sears, 1 Cr. 259; Dixon's Execrs. v. Ramsay's Execrs., 3 Cr. 319; Kerr v. Moon, 9 Wheat. 565. See *post*, Chap. 24.

³ Frink v. Sly, 4 Wis. 310.

CHAPTER V.

CONCURRENT CIVIL JURISDICTION, STATE AND NATIONAL.

- I. EXTENT THEREOF.
- II. SUIT IN NAME OF LEGAL OWNER IN UNITED STATES CIRCUIT COURT.
- III. CITIZENSHIP AND PROOF OF VALUE IN CONTROVERSY IN UNITED STATES COURTS.
- IV. DECISIONS OF NATIONAL COURTS IN CASES OF CONCURRENT JURISDICTION.
- V. JURISDICTION OF TWO OR MORE DISTRICTS IN ONE STATE.
- VI. JURISDICTION IN NATURALIZATION PROCEEDINGS.

I. EXTENT THEREOF.

Under the national Constitution and laws, the circuit courts of the United States have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, in the following enumerated cases, viz.:

1. Suits arising under the Constitution, laws, or treaties of the United States;
2. Suits in which the United States are plaintiffs or petitioners;
3. Suits in which there is a controversy between citizens of different States;
4. Suits between citizens of the same State claiming lands under grants of different States;
5. Suits in a controversy between citizens of a State and foreign states, citizens, or subjects.¹ And in naturalization proceedings.

But no one can be arrested, in any such suit, in one district for trial in another.²

¹ Act of Cong. March 3, 1875; Judiciary Act, 1 Stat. at Large, 78, § 11; Desty's Federal Procedure, 71, § 1,

Judiciary Act, 1 Stat. at Large, 78, § 11. See, also, *ex parte* Graham, 3 Wash. C. C. 456.

² Act of Cong. March 3, 1875; Judi-

Common Law Civil Jurisdiction. The term common law civil jurisdiction, as here used, is intended, in the language of the United States Supreme Court, to "embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume, to settle legal rights;" and not such proceedings only "as in forms and practice conform strictly to those of the old common law."¹ For there is no common law of the United States, as a nation; but the national courts (except in criminal cases) administer the laws of the respective States wherein they are held.²

Common and Civil Law as the Basis of State Jurisprudence. And although the common law prevails in most of the States to a certain extent, in their local jurisprudence, and forms the basis of their judicial system, yet its continued existence in their more modern codes and revisions is of so modified a character as to retain merely its leading principles and outlines, while again, in some of them, the civil law is to be regarded as the origin of their system.³ For the purpose, however, of discussing the subject matter of this section, it is intended, as above stated, to embrace all civil proceedings which do not belong to equity and maritime jurisdiction.

II. SUIT IN NAME OF LEGAL OWNER, IN UNITED STATES CIRCUIT COURT.

A person having the requisite qualification as to citizenship, and the legal right of the subject matter of the suit, may sue in the United States Circuit Court without regard to the citizenship of others who may be interested in the proceeds of the suits. Hence a note to bearer, for use of others named, as for instance, an unincorporated company, may be sued in such court by the bearer thereof, as the law places the legal interest in him. The courts have nothing to do with the trust, nor with the citi-

¹ *Parsons v. Bedford*, 3 Pet. 433, 446, 447.

² *Wheaton v. Peters*, 8 Pet. 591; *Lorman v. Clarke*, 2 McLean, 568; *Van Ness v. Packard*, 2 Pet. 137; *People v. Folsom*, 5 Cal. 373. Though the common law cannot be resorted to as giving jurisdiction to the United States

court, yet it may be resorted to, to assist in deciding certain questions after the jurisdiction has attached. *U. S. v. New Bedford Bridge*, 1 Woodb. & M. 401; *Gardner's Institutes*, 301, 302.

³ See *post*, § 1, Chap. 6; *Cooley on Const. Lim.* *21-25.

zenship, of those to whom the equitable interest in the proceeds may be going.¹

III. CITIZENSHIP AND PROOF OF VALUE IN CONTROVERSY.

In an action or suit, in a circuit court of the United States, by a citizen of one State against a citizen of another, it is not necessary that the plaintiff's petition, bill, or declaration should allege or state that the State of which either party is a citizen is one of the United States. It is sufficient if the State itself be named, and the court will necessarily take notice of the fact, if such it be, that such State is one of the United States, composing the Union, or national government.²

So, when citizenship of a litigant party, of a State, is necessary to be averred or stated in pleading, an allegation that the party is a citizen of the United States, naturalized in a certain State, and residing therein, is held to be equivalent to an averment that the party is a citizen of that State.³ To confer jurisdiction, the citizenship must be shown or alleged in the body of the bill or declaration, in such manner and place as to be traversable, and not merely in the caption.⁴

Proof made of Value, to confer Jurisdiction. And when the nature of the action or suit is such that the demand is not for money, as for instance in an ejectment or other suit for land, and the law does not require the value thereof to be stated in the declaration or petition, then the practice in the United States courts is to allow the value to be proven in evidence.⁵

Rules of Evidence. The rules of evidence in a State are also rules of evidence in the courts of the United States, under the 34th section of the judiciary act, while sitting within the limits of such State; and such State rules of evidence are always followed by the Federal courts sitting in a State, as well in commercial cases as in others.⁶ The construction given to

¹ *Bonafée v. Williams*, 3 How. 574.

² *Wright v. Hollingsworth*, 1 Pet. 165.

³ *Gassies v. Ballou*, 6 Pet. 761.

⁴ *Jackson v. Ashton*, 8 Pet. 148; *Findlay v. Bank of U. S.*, 2 McL. 44; *Bayerque v. Haley*, 1 McAll. 97; *Dodge v. Perkins*, 4 Mass. 435; *Vose v. Philbrook*, 3 Story, 336; *Course v. Stead*, 4 Dal. 22.

⁵ *Ex parte Bradstreet*, 7 Pet. 634, 647; *Crawford v. Burnham*, 4 Am. Law Times, (o. s.) 228.

⁶ *Ryan v. Bindley*, 1 Wall. 66, 68; *Vance v. Campbell*, 1 Black, 427; *Wright v. Bales*, 2 Black, 535; *Sims v. Hundley*, 6 How. 1; *Brandon v. Loftus*, 4 How. 127; *McNiell v. Holbrook*, 12 Pet. 48; *Wilcox v. Hunt*, 13 Pet.

State laws by State courts govern the United States court,¹ unless the law should be of a general nature, not confined to the locality or State.

IV. DECISIONS OF NATIONAL COURTS.

Whether decisions of the national courts are to be regarded as paramount rules of law or not, depends in some respects upon the character of the subject matter of the cause in which they are rendered, and the manner of obtaining jurisdiction of the action. In cases of concurrent jurisdiction with the State courts, as where the jurisdiction of the Federal courts rests upon the citizenship of the parties, and in which the State laws are administered, then if the questions involved are such as in regard to which the State decisions are deferred to by the Federal court, it results therefrom that the dignity and force of the judgment as a rule of law, as also the validity and effect thereof, is only such as is accorded to judgments of State courts, under similar circumstances.²

V. JURISDICTION, TWO OR MORE DISTRICTS IN ONE STATE.

When a State is divided into two districts, and a United States Circuit Court is held in each district, a defendant who is a citizen of such State may be sued in either district, if found and served therein, by a citizen of a different State. It is no defense as against the jurisdiction of the court that the defendant resides in the other district than the one in which he is sued. The fact of being found and served within the district in which he is sued brings the case within the very language of the act of the law. It takes it out of the prohibition of the judiciary act, that "no civil suit shall be brought in the courts of the United States, against an inhabitant of the United States, by any original process, in any other district than that whereof he is

378; *Haussknecht v. Claypool*, 1 Black, 431; *U. S. v. Dunham*, 21 Monthly Law Rep. 591; *Fowler v. Hecker*, 4 Blatchf. 425.

¹ *Gut v. Minnesota*, 9 Wall. 35; *King v. Wilson*, 1 Dill. 555; *Polk v. Wendal*, 9 Cr. 87; *Thatcher v. Powell*, 6 Wheat. 119; *Shelby v. Guy*, 11 Wheat. 367;

Bank of U. S. v. Daniel, 12 Pet. 33; *Green v. Neal*, 6 Pet. 291; *Suydam v. Williamson*, 24 How. 427; *Randall v. Brigham*, 7 Wall. 523; *Loring v. Marsh*, 2 Cliff. 311, 469.

² *Dupasseur v. Rochereau*, 21 Wall. 130.

an inhabitant, or in which he shall be found at the time of serving the writ."¹ In all cases on contract the suit may be brought in the circuit court of the district wherein the defendant is found. If sued out of the district in which he lives, he may object, but this is a privilege which he may waive.² When the jurisdiction of the person will enable the court to give effect to its judgment or decree, it may be exercised; but if the subject matter is local, and is situated beyond the limits of the district, the circuit court sitting in such district has no jurisdiction thereof. Actions for real property, or ejectment for possession thereof, or trespass *quare clausum fregit*, or trespass upon real property, in any manner, will not lie in any other jurisdiction than where the real property, sued for or injured, is situated.³

VI. JURISDICTION IN NATURALIZATION PROCEEDINGS.

The jurisdiction of national and State courts in cases of naturalization is *concurrent*, although the proceedings are under the laws of the former.

The jurisdiction was originally conferred upon the supreme, superior, district or circuit courts of the several States, and of territorial districts of the United States, and upon the circuit and district courts of the United States, concurrently.⁴ But doubts having arisen as to the meaning of the term *district* courts of the States, it was subsequently enacted that *every court of record in any individual State*, having common law jurisdiction and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of said original enactment.⁵ Thus it is that all State courts of record, having a seal and clerk or prothonotary, have, with the United States territorial courts, and United States district and circuit courts, jurisdiction, under the acts of Congress, of naturalization cases.

The authority to provide by law for naturalization of foreigners, or others, is exclusive in the Congress of the United States.⁶ By adoption of the United States Constitution, the naturalization laws of the several States ceased to exist.⁷

¹ *McMicken v. Webb*, 11 Pet. 25.

² *North. Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 15 How. 233.

³ *Ibid.*

⁴ U. S. Stat. at Large, 153, § 1.

⁵ U. S. Stat. at Large, 153, § 3.

⁶ *Chirac v. Chirac*, 2 Wheat. 260.

⁷ *U. S. v. Villato*, 2 Dall. 370.

CHAPTER VI.

COMMON LAW, CIVIL LAW, AND LAW OF STATE AND NATIONAL COURTS.

- I. THE COMMON LAW AND CIVIL LAW AS STATE LAWS.
- II. UNITED STATES COURTS ADMINISTER STATE LAWS.
- III. BUT NOT AS TO FORMS OF PROCESS, UNLESS ADOPTED.
- IV. PROCESSES OF STATE COURTS MAY BE ADOPTED.
- V. RULINGS OF THE COURTS. WHEN FOLLOWED.
- VI. NATIONAL POWERS AND COURTS NOT AFFECTED BY STATE LAWS.

I. THE COMMON LAW AND CIVIL LAW AS STATE LAWS.

Though the common law is presumed to exist in most of the States, as to general principles, if nothing be shown to the contrary;¹ yet it is not presumed to exist without statutory changes and modifications.²

The extent to which the common law prevails, and the modifications thereof in each particular State, depend upon the local constitution and laws thereof.³

But as to those States now existing where their were established civil governments and codes, or systems of domestic law, in which the civil law prevailed, as for instance, Louisiana, Texas and Florida, prior to their becoming Territories or States of the Union, the common law is not presumed to prevail therein.⁴

If, on the trial of a cause elsewhere, the question arises as to the law of one of these States in which the common law is not presumed to prevail, the presumption in such case is, if nothing

¹ *Crouch v. Hall*, 15 Ill. 263; *Ellis v. White*, 25 Ala. 540; *Norris v. Harris*, 15 Cal. 226; *Coburn v. Harvey*, 18 Wis. 147; *Hamilton v. Kneeland*, 1 Nev. 40; *State v. Cummings*, 33 Conn. 260; *White v. Knapp*, 47 Barb. 549; *McDougald v. Carey*, 38 Ala. 320; *Miles v. Collins*, 1 Met. (Ky.) 308; *Reese v. Mutual Benefit Ins. Co.*, 23 N. Y. 516, 522; *Plumleigh v. Cook*, 13

Ill. 669; *Sedgwick on Construction of Statutes*, 12 and note.

² *Blystone v. Burgett*, 10 Ind. 28; *Coburn v. Harvey*, 18 Wis. 147.

³ *Lorman v. Benson*, 8 Mich. 18; *Morgan v. King*, 30 Barb. 9; *Wagner v. Bissell*, 3 Iowa, 396.

⁴ *Norris v. Harris*, 15 Cal. 226; *Sedgwick on Construction of Statutes*, 12 and note.

to the contrary is shown, that the law is the same as in the State where the trial is proceeding.¹

If the contrary is insisted upon by either party, those who assert the existence of the law must plead and prove it.²

II. UNITED STATES CIRCUIT COURTS ADMINISTER THE STATE LAWS.

We have no national common law, or common law of the United States in their united capacity as a nation.³ The Federal courts administer the laws of the several States, and of the national Congress; the common law, therefore, when administered in the national courts, is administered as it exists in a more or less modified form in the State, when pertinent to the controversy.⁴

The circuit courts of the United States are bound to take notice of the general laws of the several States. They are created by Congress to administer the laws of all the States of the Union in cases to which these laws respectively apply. Their jurisdiction extends to many cases arising under State laws. This State jurisprudence is not a foreign one, to be proven in court in the ordinary manner of proving the laws of foreign countries in courts of justice, but is to be judicially taken notice of in the same manner by the United States courts as the laws of the United States are by them taken notice of.⁵ But this rule of law applies only in *law* cases, and not to proceedings in chancery.⁶

¹ *Norris v. Harris*, 15 Cal. 226; *Monroe v. Douglass*, 5 N. Y. 447. But no such presumption arises in regard to the statute laws of another State. *McCulloch v. Norwood*, 58 N. Y. 562, 567.

² *Monroe v. Douglass*, 5 N. Y. 447; *Story's Conf. of Laws*, § 638; *Greenleaf on Evidence*, § 486, *et seq.* It would seem that the same rule which governs the proof of laws of foreign countries in our State courts would also govern the proof of laws of sister States. As to how foreign laws are proved see *Hall v. Costello*, 48 N. H. 176; *Barrows v. Downs*, 9 R. I. 446; *Greenleaf on Evidence*, § 488; *Sedgwick on Construct. of Statutes*, 93 *et seq.*; *Wharton's Conf. of Laws*, § 771 *et seq.*; *Smith's Statutory Law*, Chap. 21.

³ *Wheaton v. Peters*, 8 Pet. 591; *Lor-*

man v. Clarke, 2 McLean, 568; *Van Ness v. Pacard*, 2 Pet. 137; *People v. Folsom*, 5 Cal. 374; see *ante*, Chap. 5, § I. p. 29.

⁴ *Wheaton v. Peters*, 8 Pet. 591; *Lorman v. Clarke*, 2 McLean, 568; *People v. Folsom*, 5 Cal. 374; *Van Ness v. Pacard*, 2 Pet. 137; see *ante*, Chap. 5, § I. p. 29.

⁵ *Owings v. Hull*, 9 Pet. 607; *Carpenter v. Dexter*, 8 Wall. 513, 518; *Cheever v. Wilson*, 9 Wall. 108; *Pennington v. Gibson*, 16 How. 65, 80; *Clark v. Smith*, 13 Pet. 195, 203, 205; *Piqua Branch Bank v. Knoop*, 16 How. 369; *Beauregard v. New Orleans*, 18 How. 497.

⁶ *Neves v. Scott*, 13 How. 268; *U. S. v. Howland*, 4 Wheat. 108, 115; *Boyle v. Zacharie*, 6 Pet. 648, 658; *Robinson*

And where the statute law of a State renders an unsworn plea of *non est factum* inadmissible in a State court, the courts of the United States, sitting in such State, will follow the State statute upon that subject.¹

But in cases involving general commercial law, the Federal courts construe the law for themselves, and do not defer to the State court decisions.²

III. BUT NOT AS TO FORMS AND PLEADINGS, UNLESS ADOPTED BY THEM.

Statutes of the States *in proprio vigore* are of no force so far as regards the *forms of suits, modes of proceedings, or pleadings*, in courts of the United States. Congress has exclusive authority over these subjects. So far as by act of Congress State laws have been adopted, or under authority of acts of Congress have been adopted by these courts, they are obligatory, and no further. No court, however, of the United States may adopt such as are in conflict with the acts of Congress upon the subject of jurisdiction, forms, practice or proceedings in the courts of the United States.³ A broad distinction exists in this respect as respects statutes which are rules of right and property, and such as go to the remedial forms, proceedings and practices of the courts. The former are the law of the *forum* of the United States court, in any State, when not in conflict with the national laws or Constitution, and will not only be administered, but will be taken notice of by the courts.⁴ Thus, State statutes which require suits on bills or notes, in the county where the drawers live, or where the first endorser lives, and similar requirements will be disregarded as utterly incompatible and repugnant to the organization and jurisdiction of the United States courts; and so of State laws requiring the joinder of both drawers and endorsers of bills of exchange in one and the same action, for the law of

v. Campbell, 3 Wheat. 212, 222; *Livingston v. Story*, 9 Pet. 654; *Russell v. Southard*, 12 How. 139.

¹ *Bell v. Mayor, etc., of Vicksburg*, 23 How. 443.

² *Williams v. Suffolk Ins. Co.*, 3 Sum. 270; *S. C.*, 13 Pet. 415; *Austen v. Miller*, 5 McLean, 135; *S. C.*, 13 How. 218;

Browning v. Andrews, 3 McLean, 576.

³ *Keary v. Farmers & Merchants' Bank of Memphis*, 16 Pet. 89.

⁴ *Brinc v. Insurance Co.*, 6 Otto, 627, and approved in *Orvis v. Powell* (Oct. Term Sup. Ct. of U. S., 1878); ² *Chicago Law Journal*, 190.

jurisdiction as to citizens of different States excepts suits for the contents of promissory notes or other *choses in action* in favor of an assignee, unless the suit might have been brought in such court if no assignment or endorsement had been made — except as to foreign bills of exchange. For in such cases it may often occur that the residence and citizenship of these parties are not such as to render suit against them all, in the same action, practicable in the United States court.¹

IV. PROCESSES OF STATE COURTS MAY BE ADOPTED.

The processes and practice of the highest State courts of original jurisdiction in proceedings at law are likewise conformed to by the United States circuit courts sitting in the several States, so far as the same are or shall be adopted by the said circuit courts.² But the power to adopt the same is not vested in a district judge sitting alone, as judge of a circuit court, except in those States where there may be no full circuit court, wherein the district judge and court exercises the functions and jurisdiction as well of the circuit court as of the district court.³

V. RULINGS OF THE COURT. WHEN FOLLOWED.

The construction put upon the constitutions and State laws of the several States, by their own courts, will be mutually respected and followed in the courts of each other, whenever those constructions and laws come under their judicial consideration in matters involving the same points thus adjudicated.⁴

So, too, as between the national courts and State courts. The former, as a general rule, follow the local decisions of the highest State courts of the State wherein they are sitting, when such decisions are settled and uniform and have become a rule of property, especially so, as to lands, in regard to the constructions of State constitutions, statutes, and unwritten laws, if the same do not conflict with the Constitution, treaties or laws of the

¹ *Brine v. Insurance Co.*, 6 Otto, 627, and approved in *Orvis v. Powell* (Oct. Term Sup. Ct. of U. S., 1878); 2 Chic. Law Journal, 190.

² *Amis v. Smith*, 16 Pet. 303.

³ *Ibid.*

⁴ *Brown v. Phillipps*, 16 Iowa, 210; *Franklin v. Twogood*, 25 Iowa, 520; *Thompson v. Alger*, 12 Met. 428; *Sedgwick on Const. of Statutes*, 362, 363.

United States.¹ But the national courts will not change, as a general principle, with local changes.² On the contrary, will, in questions affecting constitutional rights, or remedies of creditors, although involving State constitutions or statutes, judge for themselves, regardless of all such State court constructions as may amount to a denial of remedy; and so, too in matters of contract involving such statutory or constitutional construction.³ So, also, State court decisions and constructions of instruments on common law principles, are not binding on the Federal courts as rules of decision.⁴ Nor when made in reference to the general commercial law, if in contravention thereof.⁵

VI. NATIONAL POWERS AND JURISDICTION NOT AFFECTED BY STATE LAWS.

The jurisdiction of the Federal courts cannot be restricted or enlarged by State legislation.⁶

This is the case, too, whether viewed in relation to actions and suits originally brought therein or in reference to such as are first brought in a State court, and are removed to the United States Circuit Court under some of the acts of Congress allowing such removal.⁷

National Powers not Affected by State Laws. State laws cannot control the rightful powers of the national government, or

¹ *Thatcher v. Powell*, 6 Wheat. 119, 127; *Green v. Neal*, 6 Pet. 291, 293; *Shelly v. Guy*, 11 Wheat. 361, 367; *Taylor v. Brown*, 5 Cr. 234, 255; *McKeen v. Delancy*, 5 Cr. 22; *Massie v. Watts*, 6 Cr. 148, 167; *Elmendorf v. Taylor*, 10 Wheat. 152; *McCutchen v. Marshall*, 8 Pet. 220; *Nesmith v. Sheldon*, 7 How. 812; *Piqua Branch Bank v. Knoop*, 16 How. 369; *Parker v. Kane*, 22 How. 1; *Middleton v. McGrew*, 23 How. 45; *Bank of Hamilton v. Dudley*, 2 Pet. 492; *U. S. v. Morrison*, 4 Pet. 124; *Henderson v. Griffin*, 5 Pet. 151; *Thompson v. Phillips*, *Baldwin*, 246; *Brine v. Ins. Co.*, 6 Otto, 627; *Orvis v. Powell* (Sup. Ct. of U. S., Oct. Term, 1878); 2 *Chicago Law Journal*, 190.

² *Piqua Branch Bank v. Knoop*, 16 How. 369.

³ *Butz v. City of Muscatine*, 8 Wall. 575, 584. Changes will be made, however, if the local decisions have been misconceived. *Green v. Neal*, 6 Pet. 291.

⁴ *Foxcroft v. Mallett*, 4 How. 353.

⁵ *Swift v. Tyson*, 16 Pet. 1; *Polk v. Wendal*, 9 Cr. 87.

⁶ *Phelps v. O'Brien Co.*, 2 Dill. 518, and cases in note following.

⁷ *Phelps v. O'Brien Co.*, 2 Dill. 512; *Insurance Co. v. Morse*, 20 Wall. 445; *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417; *Hatch v. Chi. R. I. & P. R. R. Co.*, 6 Blatch. 105.

the proper discharge of the official functions of Federal officers or courts; they have no operation of their own mere force upon the process or proceedings of the courts of the United States, as to remedies or practice, and are only obligatory so far as adopted by Congress, or, under the process acts of 1792 and subsequent acts upon the same subjects, by these courts themselves; and these same courts have power to alter and amend the rules of process, as well as the manner of proceedings in court.¹ So, also, as to jurisdiction between citizens of different States, it is a well settled principle that the jurisdiction of the United States courts over controversies between citizens of different States cannot be impaired by the laws of the States prescribing the modes of redress in their courts, or regulating the distribution of State judicial powers.²

¹ *Beers v. Haughton*, 9 Pet. 329; *Bank v. Jolly*, 18 How. 503; *Suydam v. Broadnax*, 14 Pet. 67; *Payne v. Hook*, 7 Wall. 425, 430; *Beers v. Haughton*, 9 Pet. 329; *Watson v. Tarpley*, 18 How. 517.

² *Hyde v. Stone*, 20 How. 170; *Union*

CHAPTER VII.

INTER-STATE EQUITY JURISDICTION AND PRACTICE.

- I. CONCURRENT STATE AND NATIONAL EQUITY JURISDICTION.
- II. EQUITY PRACTICE AND RULES IN UNITED STATES COURTS.
- III. JURISDICTION IN UNITED STATES COURTS OF EXECUTORS AND ADMINISTRATORS.
- IV. ENJOINING OF JUDGMENT OF UNITED STATES COURT IN SAME COURT.
- V. STATE COURT MAY ACT BY INSTRUCTION UPON THE PERSON OF DEFENDANT, TO PREVENT SUIT IN ANOTHER STATE.

I. CONCURRENT STATE AND NATIONAL EQUITY JURISDICTION.

The circuit courts of the United States have a general equity jurisdiction within the rightful sphere of their authority as Federal courts in all cases where a plain, adequate and complete remedy cannot be had at law;¹ and this jurisdiction is concurrent with that of the State courts in all suits in equity between citizens of different States, where the sum or value in controversy is over five hundred dollars, exclusive of costs.²

Election of Forums. Thus, in equity suits, by citizens of one State against citizens of another State, the complainants have their election to proceed in the State court of the State wherein the defendants reside, or in the United States Circuit Court, when the sum or value of the matter in controversy amounts to over five hundred dollars, exclusive of costs.³

When Subject to Removal. And when such a suit is brought in a State court, by a citizen of the State where it is brought, against a citizen of another State, the defendant may *remove* the same, for trial into the United States Circuit Court of the district.⁴

¹ Story's Eq. Jurisprudence, § 57; Story on the Const., §§ 1645, 1646; Robinson v. Campbell, 3 Wheat. 212; U. S. v. Howland, 4 Wheat. 108, 115; Parsons v. Bedford, 3 Pet. 433; Boyce's Exrs. v. Grundy, 3 Pet. 110; Bean v. Smith, 2 Mas. 252.

² 1 Stat. at Large, 78, § 11.

³ Robinson v. Campbell, 3 Wheat. 221; Parsons v. Bedford, 3 Pet. 433; U. S. v. Howland, 4 Wheat. 115.

⁴ 1 Stat. at Large, 79, § 12.

II. EQUITY PRACTICE AND RULES IN UNITED STATES COURTS.

The proceedings, forms and practice in equity in the United States Circuit Court conform to those of the English chancery, and not to the practice of the State courts wherein the circuit court sits, as in suits at law.¹ This, too, irrespective of whether such State has a system of equity jurisprudence of its own, or not. In other words, the system of equity practice of the United States courts does not vary in the different districts with that of the respective States, but is uniform and alike in all places throughout the nation.

The enactments of Congress in reference to adopting the form of proceedings and practice of the State courts apply only to suits at law, and have no influence upon the equity proceedings in the Federal courts, for the equity jurisdiction conferred upon the Federal courts is uniform in all parts of the United States. It is the same as that of the High Court of Chancery in England, and it can neither be modified or restrained by legislation of the States.² The action of these national courts is in their own sphere, according to their own rules of proceeding; and, within their sphere, is independent of the State legislation and courts, except in so far as such legislation may give rise to, or become rules of right, or may be adopted by such national courts.³ And when the citizenship of the parties and the amount in controversy are such as to confer jurisdiction on these courts, of any equitable character, they may exercise the same and dispose of the case, irrespective of any local or State regulation indicating the manner or the tribunal for disposition, adjudication or settlement of such matters.⁴ The absence of a complete and

¹ Robinson v. Campbell, 3 Wheat. 212; Livingston v. Story, 9 Pet. 632, 655; S. C., 13 Pet. 359, and 12 Pet. 339; Gaines v. Relf, 15 Pet. 9; *Ex parte* Whitney, 13 Pet. 404; Gaines v. Chew, 2 How. 609; Poultney v. Lafayette, 12 Pet. 473, 479.

² Payne v. Hook, 7 Wall. 425, 430; Green v. Creighton, 23 How. 90; U.S. v. Howland, 4 Wheat. 108; Pratt v. Northam, 5 Mas. 95; Robinson v. Campbell, 3 Wheat. 212; Boyle v. Zacharie, 6 Pet. 348, 635; Gaines v.

Relf, 15 Pet. 9; Poultney v. Lafayette, 12 Pet. 473; *Ex parte* Whitney, 13 Pet. 404; Livingston v. Story, 9 Pet. 655; Bein v. Heath, 12 How. 168; Pennsylvania v. Wheeling Bridge Co., 13 How. 518.

³ Hyde v. Stone, 20 How. 170; Union Bank v. Jolly, 18 How. 503; Suydam v. Broadnax, 14 Pet. 67; Payne v. Hook, 7 Wall. 425, 430; Beers v. Haughton, 9 Pet. 329.

⁴ Payne v. Hook, 7 Wall. 425, 429, 430.

adequate remedy at law is the test of equitable jurisdiction. This test is to be applied to each particular cause, as the nature thereof is disclosed by the pleadings.¹

III. CIRCUIT COURT JURISDICTION OF EXECUTORS AND ADMINISTRATORS.

The jurisdiction being such, it results that a citizen of one State may maintain a suit in chancery against an administrator who is a citizen of another State, in the circuit court of the district of the latter State wherein such administrator resides, notwithstanding the laws of such latter State, wherein the administration is granted, require the affairs of the administration to be settled in a particular or specified court, and give exclusive jurisdiction thereof to such State court.² And when such suit, against the administrator, is for fraud, and to obtain an accounting and satisfaction of rights of a complainant, the sureties of the administrator, resident in the State wherein the suit is brought, are properly made defendants, inasmuch as equity, by its rules and practice, disposes of the whole subject matter when jurisdiction has attached, and does not turn a party over to the law side of the courts to consummate or obtain possession of the fruits of the suit, and therefore, in such proceeding, if the administrator is decreed to account and pay over, will include his bondsmen in the decree, if in court; whereas, if not permitted to be sued with the principal, the result would be a subsequent action or suit against them, if the administrator should not be able to satisfy the decree, or the same be not otherwise realized.³

Though State laws may operate as a rule of right in the courts of the United States, in the several States respectively, yet these laws cannot confer *jurisdiction* on a United States court, or enlarge, diminish, restrict, or take it away.⁴

Thus the circuit courts of the United States, with their full equity powers, have jurisdiction over executors and administrators, if the parties are of the proper citizenship as to different

¹ Payne v. Hook, 7 Wall. 425; Boyce's Exrs. v. Grundy, 3 Pet. 210.

² Hyde v. Stone, 20 How. 170; Union Bank v. Jolly, 18 How. 503; Suydam v. Broadnax, 14 Pet. 67.

³ Payne v. Hook, 7 Wall. 425, 432, 433.

⁴ Steamboat Orleans v. Phœbus, 11 Pet. 175; Roach v. Chapman, 22 How. 129; Suydam v. Broadnax, 14 Pet. 67; Insurance Co. v. Morse, 20 Wall. 445.

States, and in the exercise of such jurisdiction will enforce the same rules in adjusting claims against them that are enforced in the State courts as between their own citizens.¹ If, in such a proceeding in the United States court, objection be made that it was commenced too soon after perfecting the grant of administration, as for instance, within one year, when by the State statute suits may not be commenced against executors or administrators within that time, then the objection, to be available, must be made at the earliest practicable stage of the suit, and will not be allowed if made, for the first time, at the trial.²

IV. ENJOINING OF JUDGMENTS IN UNITED STATES COURT IN SAME COURT.

A proceeding in equity by the defendant, to enjoin the enforcement of a judgment rendered against him in a United States circuit court, is but an incident to the original suit in which the judgment is rendered, and is not to be regarded as an original bill or distinct proceeding. Therefore the fact that the defendant therein, who is the representative of the plaintiff in the judgment, being a citizen of the same State as the complainant, and in which the judgment is rendered, does not militate against the jurisdiction of the court to entertain the bill.³

Judgment of State Court. Bankruptcy. But a United States court may not enjoin a proceeding of a State court, except in cases within the jurisdiction in bankruptcy.⁴

V. INJUNCTION IN STATE COURT, ACTING ON THE PERSON OF DEFENDANT.

The authority of courts of one State to restrain by injunction persons within its jurisdiction from prosecuting suits either in the courts of such State or in the courts of other States, against persons, or the property there situate of persons, resident in the State wherein the injunction is asked, is fully asserted. Not by way of interference with the course of proceedings or jurisdic-

¹ Walker v. Walker, 9 Wall. 743, 755; Green v. Creighton, 23 How. 90; Harvey v. Richards, 1 Mas. 381.

² Walker v. Walker, 9 Wall. 743.

³ Dunn v. Clark, 8 Pet. 1.

⁴ 1 U. S. Stat. at Large, 334; Dial v. Reynolds, 6 Otto, 340; Diggs v. Wolcott, 4 Cr. 178; Watson v. Jones, 13 Wall. 679, 719; Peck v. Jenness, 7 How. 625.

tion of courts of other States; for, to this end, a court has no power; but upon the principle that courts of equity have full power over persons within their jurisdiction and amenable to their process, to restrain them from proceeding, either within or without the State, to do acts which are wrongful towards other residents, and therefore contrary to equity and good conscience.¹ The State courts cannot, however, enjoin proceeding in the courts of the United States;² and, as has been seen, the latter cannot in the former. In the exercise of this equitable power a court will restrain by injunction a citizen or resident within its jurisdiction from prosecuting an attachment suit in a court of another State against the personal property therein situate of an insolvent debtor, resident in the State in which the injunction is applied for, and who has made a general assignment therein valid in law, for the equal benefit of all his creditors, when the result of such attachment would be to give to the plaintiff therein a priority as to such property, and prevent the exercise of the equitable right of the assignee over the same for the equal benefit of the creditors.³

To Prevent an Attachment as Against an Assignee. The equitable right of the assignee in such case is paramount, unless some valid claim or lien exists, under the laws of the State where the property attached is situated, which under the laws of that State would override the equity of the assignment, if the attachment was abandoned.⁴

Nor does it matter, as between the equities of the assignee and the attaching plaintiff, who is a resident of the same State as the assignee, that the attachment proceedings be set on foot prior to the making of the assignment, if commenced with intent to obtain a preference over an expected assignment.⁵ "By interposing to prevent it," says BIGELOW, J., "we do not interfere with the jurisdiction in other States, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction, to prevent them

¹ *Dehon v. Foster*, 4 Allen, 545; *Massie v. Watts*, 6 Cr. 148, 158; *Briggs v. French*, 1 Sum. 504; *Engel v. Scheuerman*, 40 Geo. 206; *Story's Eq. Jur.* §§ 899-901; *Hilliard on Injunctions*, 266-272.

² *U. S. v. Keokuk*, 6 Wall. 514;

Bryan v. Hickson, 40 Geo. 405; *Kendall v. Windsor*, 6 R. I. 453; *Hines v. Ranson*, 40 Geo. 356.

³ *Dehon v. Foster*, 4 Allen, 545; *Same v. Same*, 7 Allen, 57.

⁴ *Dehon v. Foster*, 7 Allen, 57.

⁵ *Dehon v. Foster*, 4 Allen, 545.

from making use of means by which they seek to countervail and escape the operation of our own laws, in derogation of the rights, and to the wrong and injury of our own citizens."¹ This case was simply a controversy between the domestic creditors of the insolvent assignor, and did not involve the rights of citizens of the State, or residents thereof, wherein the attachment proceedings were pending. The assignment being valid where made, is valid, within the rules of comity, elsewhere, when not in derogation of the policy or law of the other State, and does not derogate from the rights of creditors resident therein; and, as personal property is without a locality, and its disposition is controlled by the laws of the owner's *domicile*, and not by those of the locality where it happens to be, such being the general principle, it follows that the transfer by assignment, when valid where made, is valid everywhere else, subject to the limitation that it is not to have an effect contrary to the laws and policy of other States, as to the injury of the citizens or residents of the States whose laws are invoked to carry it out.² By the rule laid down in Massachusetts, if the attaching creditor be resident in or a citizen of the State wherein is pending the attachment proceeding, then, in the courts of that State, the attachment overrides the foreign assignment, for the law of comity does not require the courts of a State to enforce its own laws in favor of contracts made in other States, to the detriment of the rights of its own citizens or inhabitants.³

¹ Dehon v. Foster, 4 Allen, 545.

² Dehon v. Foster, 4 Allen, 545, 553; Wales v. Alden, 22 Pick. 245; Cragin v. Lamkin, 7 Allen, 395; Swearingen v. Morris, 14 Ohio St. 424; Martin v. Potter, 11 Gray, 37.

³ Ingraham v. Geyer, 13 Mass. 146; Boyd v. Rockport Steam Mills, 7 Gray, 406; Zipcey v. Thompson, 1 Gray, 243; Cragin v. Lamkin, 7 Allen, 395.

CHAPTER VIII.

INTER-STATE LAW OF CONTRACTS.

- I. THE LAW OF THE CONTRACT.
- II. THE LAW OF PERFORMANCE.
- III. THE LAW OF THE REMEDY.
- IV. STATUTORY BONDS MADE IN STATE PROCEEDINGS.
- V. STATUTORY BONDS TAKEN IN NATIONAL PROCEEDINGS.
- VI. RULE OF DAMAGES.
- VII. CONTRACTS MADE WITH A VIEW TO VIOLATE LAWS OF ANOTHER STATE.
- VIII. STATUTE OF FRAUDS.
- IX. COMMERCIAL PAPER AND ENDORSEMENT THEREOF.
- X. MORTGAGE LIEN.
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- XII. CONTRACTS OF AFFREIGHTMENT.
- XIII. WAREHOUSE RECEIPTS.
- XIV. STOPPAGE IN TRANSITU.
- XV. INVIOABILITY OF CONTRACTS.
- XVI. USURY.

I. THE LAW OF THE CONTRACT.

It is a general principle that the validity, force and meaning of contracts which are expressed to be performable where made, or which do not purport to be performable at any particular place whatever, are governed by the law of the place where the contract is entered into, as the same existed at the date of the contract. Thus, when a contract is made in a particular State, and is performable in the same State, or is not expressly or impliedly performable in any particular State, or place, then the sufficiency of its execution, and its validity and meaning, are all determinable by the laws of the State wherein it was made. If valid there, it is valid wherever and in whatever other State it is sought to be judicially enforced, if not in its character repugnant to the laws and policy of such latter State. Therefore, in the enforcement of a contract performable at no particular place, in a suit thereon in the court of a different

State than the one in which the contract was made, the court, as a general rule, will look to and enforce the law of the State where the contract was entered into, in reference to all matters involving its execution, validity and meaning. In these respects, the *lex loci contractus*, or law of the contract, prevails.¹ In the language of the Supreme Court of the United States, in the recent case of *Scudder v. The Union National Bank*,² HUNT, J.: "Matters bearing upon the execution, interpretation, and the validity of a contract, are determined by the law of the place where the contract is made." Accordingly, where a contract is repugnant to the law of the State wherein it is made, and is part performable there, it is void, although it contemplates performance, in part, somewhere else, the contract being of a nature entire and indivisible; thus, a contract was made in the State of Iowa, for transportation of live stock, partly in said State and partly in the State of Illinois, to the city of Chicago, the contract containing a clause limiting the common law liability of the carriers, while at that time a statute was in force in Iowa declaring that "no contract, receipt, rule, or regulation, shall exempt" a "railroad or other company, person or firm, from the

¹ *Scudder v. Union National Bank*, 1 Otto, 406, 412, 413; *Dacosta v. Davis*, 4 Zab. 319; *Miller v. Tiffany*, 1 Wall. 298, 310; *Depeau v. Humphry*, 20 How. 1; *Chapman v. Robertson*, 6 Paige, 627, 634; *Andrews v. Pond*, 13 Pet. 65; *Shafer v. Bolander*, 4 G. Greene, 201; *Savary v. Savary*, 3 Iowa, 271; *Davis v. Bronson*, 6 Iowa, 410; *Cox v. U. S.*, 6 Pet. 172; *Mathuson v. Crawford*, 4 McL. 540; *Camfranke v. Burnell*, 1 Wash. C. C. 340; *Caldwell v. Carrington*, 9 Pet. 86; *Pope v. Nickerson*, 3 Story, 465, 474; *Duncan v. U. S.*, 7 Pet. 435; *Courtois v. Carpenter*, 1 Wash. C. C. 376; *Bank of Augusta v. Earle*, 13 Pet. 520; *Willings v. Consequa*, Pet. C. C. 302; *Bank of U. S. v. Donnelly*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Pet. 378; *Smith v. Godfrey*, 28 N. H. 379; *French v. Hall*, 9 N. H. 137; *Whiston v. Stodder*, 8 Martin, 95; *Smith v. Mead*, 3 Conn. 253; *Houghton v. Page*, 2 N. H. 42; *Greenwood*

v. Curtis, 6 Mass. 358, 376; *Blanchard v. Russell*, 13 Mass. 1, 4; *Arnold v. Potter*, 22 Iowa, 194; *Boyd v. Ellis*, 11 Iowa, 98; *Franklin v. Twogood*, 25 Iowa, 520; *Carnegie v. Morrison*, 2 Met. 397; *Dater v. Earle*, 3 Gray, 482; *Warder v. Arell*, 2 Wash. (Va.) 232, 298; *Seymour v. Butler*, 8 Iowa, 304; *De Wolf v. Johnson*, 10 Wheat. 367; *Fisher v. Otis*, 3 Chand. 83; *Anstedt v. Sutter*, 30 Ill. 164; *Short v. Trabue*, 4 Met. (Ky.) 299; *Jameson v. Gregory*, *ibid.* 363; *McIntire v. Parks*, 3 Met. (Ky.) 207; *Barry v. Equitable Life Assn.*, 59 N. Y. 587, 594; *Evans v. Anderson*, 78 Ill. 558; *Downer v. Chesebrough*, 36 Conn. 39; *Klinck v. Price*, 4 West Va. 4; *Levy v. Levy*, 78 Penn. St. 507; *Story's Conf. of Laws*, § 242 *et seq.*; *Wharton's Conf. of Laws*, § 401½; *Foote's Priv. International Law*, 287 *et seq.*

² 1 Otto, 406.

full liabilities of a common carrier, which, in the absence of any contract, receipt, rule, or regulation, would exist," in respect to the property or persons undertaken to be carried; the Supreme Court of Iowa held the contract void, as in violation of said statute, notwithstanding the objection urged to such ruling that the contract was in part performable in Illinois, where, in law, such limitation of liability was permissible.¹ So, if, according to the law of the place where a contract is executed or made, it be inoperative or void; or, being valid when made, thereafter is satisfied or discharged, it will then be so treated and regarded in law in all other States in which its validity or enforcement is judicially drawn in question.² Change of place cannot change the rights or liabilities of parties. Thus, if by law of the State wherein a promissory note is made, such note may not be transferable by endorsement, or being transferable by endorsement, yet if an endorsement thereof in such State is, for any reason, invalid by the local law, then such transfer will, in either case, be held invalid in all other States wherein the same may be judicially sought to be enforced.³ And where a contract thus entitled to be governed as to its validity by the law of the State wherein it is made, is secured by mortgage on real estate situated in a different State, without any provision for or indication that payment thereof is to be performed in the latter State, then the mere fact of taking local security in such other State will not affect the validity of the contract, although there be that in the contract itself which would invalidate the same, if made in, or to be performed in, such latter State.⁴

¹ *McDaniel v. Chicago & N. W. R. R. Co.*, 24 Iowa, 412.

² *Webster v. Massey*, 2 Wash. C. C. 157; *Green v. Sarmiento*, 3 Wash. C. C. 17; *S. C. Pet. C. C. 74*; *Warder v. Arell*, 2 Wash. (Va.) 282. But it does not follow that a release of one partner, in writing, avowedly designed to release but the one, will be treated as a release of others, though made where the obligation was contracted, but may be treated as an undertaking not to sue the party purporting to be released. *Seymour v. Butler*, 8 Iowa, 304. *McDaniel v. Chi & N. W. R. R. Co.*, 24 Iowa, 412; *Anstedt v. Sutter*,

30 Ill. 164; *Bliss v. Brainard*, 41 N. H. 256; *Duncomb v. Bunker*, 2 Met. 8; *Palmer v. Yarrington*, 1 Ohio St. 253; *Shelton v. Marshall*, 16 Tex. 344; *Thompson v. Ketcham*, 8 John. 190; *Ford v. Buckeye State Ins. Co.*, 6 Bush, 133; *Titus v. Scantling*, 4 Blackf. 89; *Moore v. Clopton*, 22 Ark. 125. See, also, references made *ante*, p. 46, note 1.

³ *McClintick v. Cummins*, 3 McLean, 158; *Roosa v. Crist*, 17 Ill. 450; *Carlisle v. Chamber*, 4 Bush, 268; *Bishop on Contracts*, § 730.

⁴ *De Wolf v. Johnson*, 10 Wheat. 363; *Bethell v. Bethell*, 54 Ind. 423.

Thus, where, as in the case just cited, a contract and loan of money was made in Rhode Island, embodying a usurious transaction by the laws of Rhode Island, as also by the laws of Kentucky, and real estate security was taken in the State of Kentucky, it was held that the laws of Rhode Island governed as to the effect of the usury on the validity of the contract, and that, therefore, while by the law of Kentucky such a contract, if there made, or payable there, would be void, but by the laws of Rhode Island would only subject the party to a penalty, the latter was held to be the law of the contract, and it was enforceable by the law of Kentucky.¹

The case of *Anstedt v. Sutter*, above referred to, was an action in a court of Illinois, for an indebtedness accruing in Missouri, for the price of wine sold to defendant in Missouri, on a credit, in violation of a statute of that State, declaring all contracts for sale of liquors, on a credit, void. The courts of Illinois held, in accordance with the general doctrine, that, the contract being void where made, was void everywhere else. The contract was a general one, as to time and place of payment, and therefore necessarily rested on the law of Missouri for its validity.²

Transactions bearing Relation to Several States. A note made in one State, at a rate of interest lawful in that State, and secured by a mortgage lien on lands situated in such State, and which instruments were for money loaned by a citizen of a different State, and were delivered to him in such other State where the contract of loan was agreed to, was held to be legal and enforceable in the courts of the State where the land was situate, and where the debtor resided at the time of making the contract, as also of enforcing the same, although such instruments called for a greater interest than allowed by law in the State where the contract was agreed on and the instruments were delivered, and although in such latter State a forfeiture of the debt is incurred for usury. The ruling was that the whole transaction had reference to the laws of the State where the land was situate, the debtor resided, and the instruments were made, although the

¹ *De Wolf v. Johnson*, 10 Wheat. 368; *Levy v. Levy*, 78 Penn. St. 507; *Phila. Loan Co. v. Towner*, 13 Conn. 249.

² *Anstedt v. Sutter*, 30 Ill. 164. See,

also, *Hill v. Spear*, 50 N. H. 253; *Tegler v. Shipman*, 33 Iowa, 194; *Boothby v. Plaisted*, 51 N. H. 436; *Webber v. Howe*, 36 Mich. 150.

latter were delivered elsewhere, as above stated, and notwithstanding, also, that the notes were made payable in a still different State than that wherein they were made or delivered, or wherein either party resided.¹

Thus, a note, and mortgage made in Michigan to secure the same, on real property therein situated, calling for interest at ten per centum per annum, a rate of interest legal in Michigan, is binding and valid, although the note be payable in New York, where such interest is usurious. Such a contract is a Michigan and not a New York contract, and is therefore governed by the laws of Michigan as to its validity.²

And so, a note made payable, with lawful interest, in the State where made, wherein also both maker and endorser reside, being valid in the State where made, does not become usurious by being discounted in another State at a discount greater than the rate of interest there allowed by law.³ And a contract of insurance, made with an insurance company of one State, and dated and executed by the president and secretary in that State, but not to become obligatory until countersigned and delivered by the agent of the company, in another State, is deemed to have been made when so countersigned and delivered in the latter State, and is governed by the laws thereof.⁴

Contracts made in one State, and performable in another, as a subterfuge or shift, rest for their validity on the *lex loci*, or law of the place where made.⁵ Contracts which are valid in the State where made, but which are to be performed in a State where they are invalid, will be held in the former State as governed by the law of the latter State, and therefore invalid.⁶ But contracts invalid by the law of the State where made, yet valid by the law of the State where they are to be performed, will be held valid in the former.⁷

The personal executory contracts of an Indian, made within the territorial jurisdiction of a State, is governed as to its valid-

¹ Arnold v. Potter, 22 Iowa, 194.

⁵ Andrews v. Pond, 13 Pet. 65.

² Fitch v. Remer, 1 Biss. 337; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Levy v. Levy, 78 Penn. St. 507.

⁶ Ibid.; Story on Conf. of Laws, § 304a.

³ Hackettstown Bank v. Rea, 6 Lans. 455.

⁷ Arnold v. Potter, 22 Iowa, 194; Junction Railroad v. Ashland Bank, 12 Wall. 226; Kennedy v. Knight, 21 Wis. 340; Bishop on Contracts, § 726.

⁴ Daniels v. Hudson R. Ins. Co., 12 Cush. 416.

ity by the laws of that State, if there is no law of Congress prohibiting the making of such contract, or if it is not contrary to the policy of the national government;¹ and though a general contract, sued on in another State than where made, be such that if made where sued it would not be valid in law, yet if valid in the State where made, and not contrary to good morals, and it was not in the making thereof contemplated to violate the laws of policy of the State where sued, it will be therein enforced, by the principles of comity.² But if vicious in principle, or contrary to good morals, or if it is calculated to contravene the policy or laws of the State where sought to be enforced, then the courts thereof will not enforce the same.³

When the validity of a contract involves the laws of two or more States, and it is not expressly apparent which the parties had in view, then that law which is most favorable to validity will be regarded as the law of the contract.⁴

II. THE LAW OF PERFORMANCE.

The Law of the Place of Performance is the Law of Performance. The law of the place where performance is to occur governs in respect to the validity and performance of contracts, made in one State, but to be performed in another. As, for instance, in commercial contracts, the time, manner, and circumstances of presentation or demand, for acceptance, payment, or protest; the rate of interest if none be designated, and whatever else relates to the fulfillment of contract or obligation.⁵ To quote again from our highest national court: "Matters connected with * * * performance are regulated by the law prevailing at the place of

¹ Taylor v. Drew, 21 Ark. 485.

² Greenwood v. Curtis, 6 Mass. 358, 378; Adams v. Gay, 19 Vt. 358; Crosby v. Berger, 3 Edw. Ch. 538; Blanchard v. Russell, 13 Mass. 1; Bliss v. Brainard, 41 N. H. 256; Phinney v. Baldwin, 16 Ill. 108; Story's Conf. of Laws, § 242 *et seq.*

³ Pearsall v. Dwight, 2 Mass. 84; Davis v. Bronson, 6 Iowa, 410; Armstrong v. Toler, 11 Wheat. 258; Commonwealth v. Aves, 18 Pick. 193; Phinney v. Baldwin, 16 Ill. 108; Greenwood v. Curtis, 6 Mass. 358;

Windsor v. Jacob, 2 Tyler, (Vt.) 192.

⁴ De Wolf v. Johnson, 10 Wheat. 367; Arnold v. Potter, 22 Iowa, 194; Talbot v. Merchants' Disp. & Trans. Co., 41 Iowa, 247, 251.

⁵ Young v. Harris, 14 B. Mon. 447; Pomeroy v. Ainsworth, 22 Barb. 118; Scudder v. Union National Bank, 1 Otto, 406, 413; Hayden v. Davis, 3 McL. 276; Arnold v. Potter, 22 Iowa, 194; Boyd v. Ellis, 11 Iowa, 98; Cook v. Moffat, 5 How. 295; Butler v. Myer, 17 Ind. 77; Thayer v. Elliott, 16 N. H. 102; Andrews v. Pond, 13 Pet. 77.

performance."¹ Thus notes drawn in one State and delivered and payable in another, for purchases made there, are governed by the law of the latter State, and are considered there made;² for by *delivery* only, the act of making is fully consummated. If, in such case, nothing be said in the notes as to interest, then interest is allowable according to the law where the same are payable.³ The parties, however, may expressly stipulate in the instruments themselves, for such interest as is allowable in either State⁴ (but, *semble*, not for interest in conformity to the law of a still different or third State).

Performance in Two Different States. The principle of the law, however, that performance is to be in accordance with the law of the place at which performance is provided for by the contract, does not apply to contracts performable in *parts*, and which are performable partly in one State and partly in another. It is said that, in such cases, the law of the place where the contract is made prevails.⁵

But if a contract be *entire*, and indivisible, and is to be partly performed in the State where it is made, and partly in another, then the *lex loci contractus*, or law of the State where it is made, governs as to its validity; and, if invalid there, it is invalid everywhere else.⁶ The case of *McDaniel v. The Chicago & Northwestern Railroad Company* grew out of a contract for transportation of cattle, from Clinton, Iowa, to Chicago, in Illinois. The contract was made in Iowa, and the property there

¹ *Scudder v. Union National Bank*, 1 Otto, 406, 413.

² *Cook v. Moffat*, 5 How. 295; *Lee v. Selleck*, 33 N. Y. 615.

³ *Arnold v. Potter*, 22 Iowa, 194; *Butters v. Olds*, 11 Iowa, 1; *Peck v. Mayo*, 14 Vt. 33; *Parson's Mercantile Law*, 321. But though a note be so affected with usury, by the law where it is made, as would there incur a *forfeiture* on account thereof, yet such *forfeiture* cannot be enforced affirmatively in another State, in a suit on such note. The court there will neither enforce the *forfeiture* nor the *usury*. *Wright v. Bartlette*, 43 N. H. 548. They will simply enforce the

payment of the principal and legal interest.

⁴ *Arnold v. Potter*, 22 Iowa, 194, 198; *Butters v. Olds*, 11 Iowa, 1; *Peck v. Mayo*, 14 Vt. 33; *Smith v. Smith*, 2 John. 236; *Thompson v. Ketcham*, 4 John. 285; *Cox v. U. S.*, 6 Pet. 172; *Andrews v. Pond*, 13 Pet. 65.

⁵ *Morgan v. New Orleans R. R. Co.*, 2 Woods, 244. So, also, where practical, the laws of the respective States will be applied to such part of the contract as is to be performed in each. *Pomeroy v. Ainsworth*, 22 Barb. 118; *Glenn v. Thistle*, 23 Miss. 42.

⁶ *McDaniel v. The Chicago & N.W. R. R. Co.*, 24 Iowa, 412.

received by the railroad. The contract contained a clause restricting the liability of the railroad company for loss in carriage, which, in effect, violated a law of Iowa, inhibiting such restrictions and declaring them void. On a trial in Iowa, growing out of a loss in carriage, the question arose as to the law of the contract, and it was held that the Iowa law was the law of the contract; that the restriction was inoperative, and that the rule of the common law was to apply to the case. The court, COLE, J., say: "The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made."¹

III. THE LAW OF THE REMEDY. LEX FORI.

The law of the *forum*, or place where suit is brought, governs as regards the remedy in the enforcement of contracts. Thus, contracts made in one State, and enforced by suit in another, whether made in expectation of performance in such latter State, or made without any designated place of performance, as for instance, a general promise to pay a sum of money, are governed, in their legal enforcement, by the laws of the place where the suit is brought, as to all things pertaining to the remedy.² In the language of the United States Supreme Court: "Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."³

Pleadings and evidence are matters strictly appertaining to the remedy, and, in respect to their sufficiency and admissibility,

¹ 24 Iowa, 417, 418.

² Scudder v. Union National Bank, 1 Otto, 406, 413; Williams v. Haines, 27 Iowa, 251; Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Douglas v. Oldham, 6 N. H. 150; Bank of U. S. v. Donnally, 8 Pet. 361; Warren v. Lynch, 5 John. 239; Thrasher v. Ever-

hart, 3 Gill & J. 234; Andrews v. Herriot, 4 Cow. 503; Scoville v. Canfield, 14 John. 338; Broadhead v. Noyes, 9 Mo. 56; Wharton's Conf. of Laws, § 741 *et seq.*; Foote's Private International Law, 413; Story's Conf. of Laws, 556, 557.

³ Scudder v. Union National Bank, 1 Otto, 406, 413.

come within the rule of being governed by the law of the *forum*, or place where the trial is had. The case here cited very fully illustrates the application of this principle. It was an action in a court of Iowa, upon a sealed instrument for the payment of money, executed in the State of Maryland; an instrument of such a character as is usually termed a writing obligatory. The common law rule was shown to have prevailed in Maryland, by the pleadings, at the date of the instrument, and that thereby the *consideration* for which the instrument was given could not be brought in question by a plea of want of consideration. But the court held to the contrary, and the Supreme Court of Iowa affirmed the decision, upon the principle that the question was one as to the *remedy* merely, and was governed by the law of the *forum*, which had abolished the common law distinction and permitted the consideration of sealed as well as unsealed instruments to be enquired into by pleadings and evidence.¹ In this case, the Supreme Court of Iowa, DILLON, J., say: "The plaintiff must take such remedy as our laws afford him. * * * Respecting what shall be good defenses to actions in this State, its courts must administer its own laws, and not those of other States." * * * And, "our act of the legislature, allowing the defense of want of consideration to be pleaded to all actions on subsequent sealed contracts, is a matter relating to the remedy, and does not impair the *obligation* of the contract within the meaning of the authoritative adjudications of the Supreme Court of the United States."

Whenever a remedy by suit is sought, the plaintiff takes such remedy as the law of the *forum*, or place of suit, affords, whether suit be in a State court or in a United States court. This is so, not only as to the law of trial, but also as to the enforcement of any judgment that may be obtained. Hence, as exemption laws pertain to the remedy, exemption from execution sale depends upon the law of the *forum*, and not upon the *lex loci contractus*.²

¹ Williams v. Haines, 27 Iowa, 251. See, also, U. S. v. Donnally, 8 Pet. 361; Le Roy v. Beard, 8 How. 451; Warren v. Lynch, 5 John. 239; Foote's Pri-

vate International Law, 424 and 431.

² Newell v. Hayden, 8 Iowa, 140; Helfenstein v. Cave, 3 Iowa, 287.

IV. STATUTORY BONDS IN STATE PROCEEDINGS.

What Statutory Obligations are Local. As a general principle, all statutory bonds, obligations and recognizances entered into in the course of judicial proceedings, and in accordance with the statute law of the *forum* where taken, made or executed, and in reference to such proceedings, as, also, official bonds for the faithful performance of statutory duties, the manner of enforcement of which are defined by statute, are local in their nature, and the enforcement thereof is confined to the courts of the sovereignty or State where made or entered into. The taking and enforcement thereof is a part of the internal policy of the State, and the means by which the State regulates its own internal concerns and conducts its official business, and, inasmuch as they are thus local, they cannot be enforced by suit in the courts of another State, either by *proprio vigore* of such statute laws, or upon the principles of comity.¹ No State interferes with the internal affairs of another, nor will enforce obligations entered into with a view thereto, and intended to operate only in aid thereof.²

Such securities are unlike those personal obligations which occur between men in their ordinary transactions of life, and which are made by private persons, as evidences of private right, and which rest for validity upon the general principles of the common law, and are made without regard to any local regulations for their validity or enforcement, and are, therefore, of equal legal and moral force, wherever the parties may thereafter be, and which, following the person, will be enforced in all countries where the rights and liabilities of contracts are by general law recognized and enforced.³

What Statutory Obligations are Enforceable in Other States. Such contracts and obligations as these latter, that are dependent on the general law as to validity, and on the law of the *forum* for their enforcement, will be enforced, however, in the courts of another State, although they originate in the administration of the laws of a State, and are of a public nature, and under statutory provisions, where the obligation is plain and direct, and is

¹ Pickering v. Fisk, 6 Vt. 102; Indiana v. John, 5 Ham. (Ohio) 218.

² Pickering v. Fisk, 6 Vt. 102; Hunt

v. Pownal, 9 Vt. 411; Story's Conf. of Laws, § 625 a.

³ Ibid.

left for its operation, enforcement, and effect, to rest upon the rules of the common law.¹ But when they are to have effect only in a particular way, and are enforceable only in a particular manner pointed out by the statute under which they are made, their enforcement is exclusively in the courts of the State in which they originate.² The case of *Pickering v. Fisk*, above cited, was an action, in the court of Vermont, upon a bond executed by the sheriff of Grafton county, in the State of New Hampshire, and his sureties. The bond was payable to the State treasurer and his successors in office, conditioned for the faithful discharge of the duties of the office of sheriff. The suit was against one of the sureties, not in the name of the State treasurer of New Hampshire, but in the name of a private person, as permitted by the statute of New Hampshire, for neglect of duty in not serving and returning a writ of execution, and loss of plaintiff, incurred by such neglect. The Supreme Court of Vermont held that no action would lie on such bond in the courts of that State, at the suit of a person, as the New Hampshire statute tolerating such proceeding had no force within the State of Vermont, and could not be administered by the courts of the latter State. Remedies are administered only in accordance with the law of the *forum*.

The very learned Justice REDFIELD, in discussing a kindred question in *Dimick v. Brooks*,³ expressed grave doubts whether courts of one State can give effect to judgments of another State by the enforcement of collateral remedies which the prevailing party is entitled to in the *forum* where the judgments are rendered, as for instance, *scire facias*, or debt upon recognizances, of bail on *mesne* process, and suits against receptors of property, upon replevin bonds, or against sheriffs for neglect of duty, believing them all to be confined to local jurisdiction; as, also, prison bonds, and warrants of attorney to confess judgment; and assumes it to be very clearly the law that remedy by *scire facias* to enforce any such collateral remedy, must be confined to the *forum* of the record.

Statutory Obligations. Official Bonds, Continued. Official or statutory bonds, taken in one State under and by virtue of a stat-

¹ *Pickering v. Fisk*, 6 Vt. 102; *Hunt v. Pownal*, 9 Vt. 411; *Story's Conf. of Laws*, § 625 a.

² *Ibid.*

³ 21 Vt. 569, 579, 580.

ute or statutes thereof, and enforceable according to such statute or statutes, are not enforceable in the courts of other States, in the peculiar manner and for the purposes prescribed by statute.¹ And not being given except for these peculiar purposes, and being enforceable only in the manner prescribed under the statute, it follows therefrom that, in other States, they are not enforceable at all; for the proceeding to enforce them, though judicial in character, is also administrative, as part of the machinery of State for carrying out the purposes of government in the various departments, and is essentially local to the tribunals of the State wherein they originate, as no State undertakes to administer the affairs, or enforce the laws of other States for purposes purely administrative.²

Exceptions to the Rule. But, if the obligation be plain, certain and direct, and in accordance with the principles of general law prevailing among civilized communities, and are merely dependent for enforcement on the *law of the forum*, then, although the purpose be administrative, they will be enforced in another State, though of a public nature and resting upon statute.³

V. STATUTORY BONDS IN FEDERAL PROCEEDINGS.

Where Payable. Official bonds of officers of the United States, executed to the United States, conditioned for faithful performance of official duties, and delivered to the proper department of the government at Washington, are, in contemplation of law, made at that place, although executed, except as to delivery, in one of the States. In case of accountability, under such bonds, payment is to be made at the treasury. The bonds are entered into in reference to that place, under the laws of the United States, and those laws and the rule of the common law govern as the law of the contract.⁴

Where a collector's bond was signed by himself and sureties, in Florida, and mailed to the proper department at Washington for approval and acceptance, and one of the sureties died while the bond was in transit between Florida and Washington, and

¹ *Indiana v. John*, 5 Ham. 218; *Pickering v. Fisk*, 6 Vt. 102.

² *Pickering v. Fisk*, 6 Vt. 102; *McFee v. South Car. Ins. Co.*, 2 McCord, 503.

³ *Pickering v. Fisk*, 6 Vt. 102.

⁴ *Cox v. U. S.*, 6 Pet. 172, 204; *Duncan v. U. S.*, 7 Pet. 435; *U. S. v. Stephenson*, 1 McLean, 462.

before its approval and acceptance, it was held that the bond was valid, and that the sureties were bound thereby.¹

Taking Effect by Relation. That though delivered for acceptance and approval, or placed in course of transit for that purpose, and though the contract be not complete till approved and accepted, yet when these acts are performed by the proper government functionary they then relate back to the date of the bond, and make it a valid bond as of that date, and therefore the surety who had died in the interval was bound thereby, and recovery was allowed and sustained against his administrator, on the bond.²

Rule of Relation as to Bonds of Postmasters. But the rule of law is different as to the time of taking effect of a bond executed by a deputy postmaster to the postmaster-general. The latter takes effect when it is received by the postmaster-general and is by him accepted. Until then it is merely an offer.³ There is a difference in this respect between bonds of a postmaster and collectors' bonds. Collectors are authorized to discharge the duties of their office for three months without giving bond; in other words, they have three months in which to give bond; but postmasters must give bonds, with approved security, on their appointment. The appointment and giving bond are concurrent acts, and the appointment, without bond and security approved, does not in itself confer power to act. Hence, the date and taking effect of a postmaster's bond bear relation to the date of his appointment; whereas, a collector's bond, when accepted by official approval, relates back to its date, so as to cover the interval of time in which he had acted officially prior to its approval.⁴

In the case of *Le Baron*, the Supreme Court of the United States say: "It is like the case of *Bruce v. The State of Maryland*,⁵ where it was held that the bond of a sheriff took effect only when approved by the county court; because it was only on such approval that the sheriff was authorized to act."⁶

Attachment Bonds. On an attachment bond executed to the marshal of the United States, in a proceeding by attachment in the United States Circuit Court, a suit lies, in the same court,

¹ *Broome v. U. S.*, 15 How. 143.

² *Ibid.*

³ *U. S. v. Le Baron*, 19 How. 73, 77.

⁴ *Ibid.*

⁵ 11 Gill & J. 332.

⁶ 19 How. 77.

in behalf of the marshal as plaintiff, if averred to be for the benefit of persons citizens of a different State than that of the defendant, although the marshal's office has expired, and he has ceased to act as such officer. The real plaintiffs are those for whose use the suit is brought.¹

VI. RULE OF DAMAGES ON INTER-STATE OBLIGATIONS.

The measure and rule of damages to be awarded for the breach or non-performance of contracts made in one State, and expressed to be performable or payable in another State, it has been held, are the law of the State wherein the contract is made. The *lex loci contractus* governs in that respect, for the matter is matter of right, appertaining to the obligation of the contract, and not of remedy in reference to the manner, merely, of enforcing it.² But in cases of promissory notes made payable in a State other than where made, the rule of damages in case of a breach, it would seem, would be that of the place of performance.³ In cases of tort, the rule of damages is always enforced under the measure of the *lex fori*, as will be seen hereafter.

VII. CONTRACTS MADE WITH A VIEW TO VIOLATION OF LAW OF ANOTHER STATE.

Void Contracts. Contracts entered into in one State, with a view to, or in contemplation of, the violation of the laws of another State, or with intent to enable a party to violate the same, are not enforceable in the courts of the latter, although legal in the State, or by the laws thereof, where made.⁴

Knowledge Alone not Sufficient. There Must be Illegal Intent. A mere knowledge, of a party to a contract, that the other party thereto intends to use an article contracted for by selling the same in another State, in violation of the laws thereof, will not in itself avoid the contract, or prevent a recovery thereon in such

¹ Huff v. Hutchinson, 14 How. 586.

² Jaffray v. Dennis, 2 Wash. C. C. 253; Consequa v. Willings, Pet. C. C. 225; Willings v. Consequa, Ibid. 302.

³ Story's Conf. of Laws, §§ 304 b, 307 a.; Foote's Private International Law, 351 et seq.; Field on Damages, §

214; Scofield v. Day, 20 John. 102; Archer v. Dunn, 2 W. & S. 327.

⁴ Davis v. Bronson, 6 Iowa, 410, 433; Armstrong v. Toler, 11 Wheat. 258; Bliss v. Brainard, 41 N. H. 256; Phinney v. Baldwin, 16 Ill. 108; Commonwealth v. Aves, 18 Pick. 193.

other State; there must be some sort of mutuality in the evil or wrong intent, or some purpose of aiding therein.¹

Purchase Made in One State by Order from Another State. A purchase made by order from one State, of a person in another State, there sending or forwarding the article bought, to the buyer, is regarded in law as a transaction in the State where the vendor resided, or from wherein he forwards the article, and depends for validity upon the law thereof.²

Contracts of Common Carriers. The contracts of a common carrier to carry property from a point in one State to a point in another, over a route lying partly in each of said States, is governed as to its validity and interpretation by the law of the place where the contract is made and the property to be carried is received.³ Thus, where a railroad company undertook to carry property from Clinton, in Iowa, to Chicago, in Illinois, over its road between those places, and stipulated for a restriction from the ordinary liability of common carrier, in contravention of a statute law of Iowa inhibiting such restriction, it was held that the contract, being partly performable in each State, was to be governed as to validity by the laws of Iowa, and that, by reason of such illegal restriction, it was void; and that, therefore, the ordinary liability attached to the carrier.⁴ So, as in *Talbott v. The Merchants' Dispatch Transportation Company*, above cited, where a contract of transportation was made in Connecticut, for the carriage of property there received to Des Moines, Iowa, in which contract there was a stipulation in favor of the carrier, against loss by fire, and under which contract the property was received and transported as far as Chicago, in Illinois, and was there destroyed by fire, without fault of the carrier, and the laws both of Connecticut and Illinois tolerated such exemption in carriers' contracts, it was held that the carrier was exempt from liability, although the laws of Iowa, where the action was tried,

¹ *Johnson v. Gregory's Exrs.*, 4 Met. (Ky.) 363; *McIntyre v. Parks*, 3 Met. (Mass.) 207; *Boothby v. Plaisted*, 51 N. H. 436; *Tegler v. Shipman*, 33 Iowa, 194; *Hill v. Spear*, 50 N. H. 253.

² *Holman v. Johnson*, Cowper, 341; *Sortwell v. Hughes*, 1 Curtis, 244; *Hill v. Spear*, 50 N. H. 253; *Tegler v. Ship-*

man, 33 Iowa, 194; *Boothby v. Plaisted*, 51 N. H. 436.

³ *McDaniel v. Chicago & N. W. R. R. Co.*, 24 Iowa, 412; *Talbott v. Merchants' Dispatch Trans. Co.*, 41 Iowa, 247.

⁴ *McDaniel v. Chi. & N. W. R. R. Co.*, 24 Iowa, 412.

and the property was to have been delivered by the carrier, prohibits such contracts and renders the same invalid; such prohibition and invalidity under the Iowa law has no extra-territorial force to invalidate a contract made elsewhere, in case of loss sustained in a State where such exemption was allowed by law.¹

VIII. STATUTE OF FRAUDS.

The Statute of Frauds is of the *lex loci contractus*, and therefore, if a contract made in one State be sued on or brought in question in the courts of another State, a party relying on the Statute of Frauds must rely upon the statute of the State where the contract was made,² and must plead and prove the same, with averments and proof also, if not otherwise admitted by the pleadings, of the place of the alleged making of the contract.³ And when proven, the statute is not enforced, strictly speaking, as a law, but as entering into, and forming a part of, the contract. If the contract is not subject to the Statute of Frauds where made, but by the statute of the State where performable, the contract is void, yet it will be held valid, and will be construed by the *lex loci contractus*.⁴

IX. COMMERCIAL PAPER AND ENDORSEMENTS.

Law of Place of Payments Governs. Notes and other commercial paper, for payment of money, made in one State and payable in another, are payable, and carry a liability to payment, according to the law of the place where payable.⁵

Law of Place of Endorsement Governs; Fixes the Liability of the Endorser. But an endorsement thereof is governed by the

¹ Talbott v. Merchants' Dispatch Trans. Co., 41 Iowa, 247.

² Denny v. Williams, 5 Allen, 1; Forward v. Harris, 30 Barb. 333; Low v. Andrews, 1 Story, 38; Allshouse v. Ramsay, 6 Whart. 331; Scudder v. Union Nat. Bank, 1 Otto, 406; Robb v. Halsey, 11 Sm. & M. 140.

³ Forward v. Harris, 30 Barb. 333.

⁴ Scudder v. Union Nat. Bank, 1 Otto, 406; Forward v. Harris, 30 Barb.

333; Carrigan v. Brent, 1 McLean, 167.

⁵ Hunt v. Standart, 15 Ind. 33; Andrews v. Pond, 13 Pet. 65; Freese v. Brownell, 35 N. J. 285; Edwards on Bills, 173; Daniels on Neg. Instruments, § 879 *et seq.* So the number of days of grace allowed is governed by the law of the place where the note is payable. Story's Conf. of Laws, § 361.

law where the endorsement is made;¹ for it is not an undertaking to pay at any particular place.²

Contracts of Maker and Endorser Distinct. The endorser will not be held to have accepted the place where the note is payable. He makes a new contract; and that contract is governed by the *lex loci contractus*.

The liability of an endorser, of a bill or note drawn in one State and payable in another, rests upon the law of the State wherein the endorsement is made. The contract of endorsement is distinct in itself, and is an assumption to pay upon such conditions as attend such an act, by the law of the State where the act is done. The construction thereof, and of the diligence to be used by a plaintiff to entitle him to recover against the endorser, must therefore be governed by the laws of the State where the contract of endorsement is made, for it is a contract to pay, if liable at all, where the endorsement is made.³

It may therefore be regarded as settled that a contract of endorsement of negotiable paper is subject to the law of the place where the endorsement is made and completed, without regard to the place of payment or place of making of the note itself; for the contracts of maker and of endorser are separate and distinct. The endorser's liability is conditional, and, as to time or place of payment, is general; therefore a note may be payable at a particular time and place, but an ordinary endorsement thereof is not an undertaking to pay at such time or such place, but is an undertaking to pay generally wherever called on, if the note be not paid by the maker, and he, the endorser, be duly notified thereof.⁴

The endorsement is a distinct contract from that of making

¹ *Shaw v. Wood*, 8 Ind. 518; *Rose v. Thames Bank*, 15 Ind. 292; *Hutchens v. Hanna*, 8 Ind. 533; *Trabue v. Short*, 5 Cold. 293; *Dow v. Rowell*, 12 N. H. 49; *Dundas v. Bowler*, 3 McL. 400; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Daniels on Neg. Instruments*, § 899.

² *Rose v. Thames Bank*, 15 Ind. 292. See, also, cases cited in the preceding note.

³ *Chatham Bank v. Allison*, 15 Iowa,

357; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Trabue v. Short*, 18 La. Ann. 257; *Hunt v. Standart*, 15 Ind. 35; *Holbrook v. Vibbard*, 2 Scam. 465; *Musson v. Lake*, 4 How. 262.

⁴ *Short v. Trabue*, 4 Met. (Ky) 299; *Holbrook v. Vibbard*, 2 Scam. 465; *Hunt v. Standart*, 15 Ind. 33; *Lowrey v. Western Bank of Georgia*, 7 Ala. 120; *Hatcher v. McMorine*, 4 Dev. 122; *Shaw v. Wood*, 8 Ind. 518; *Hutchens v. Hanna*, 8 Ind. 533.

the paper itself, and is governed, as to its validity, legal effect, and liability of the endorser, by the law of the place where the endorsement is made, and not where the instrument itself was made or is payable.¹

Delivery. But the contract of endorsement is not, in law, always made at the place where the endorsement is written upon the bill or note. The true rule is, that the contract is completed only by the delivery of the instrument. So that the endorsement must not only be written, but must be delivered, in order to bind the endorser; hence, as was held in the case above cited, of *The Chatham Bank v. Allison*, where an endorsement is made in one State and then the bill, and endorsement on it, is sent by the endorser to a bank in a different State, to be collected or negotiated, and, after acceptance by the payee, the bank discounts the bill, the contract of endorsement only became complete as between the endorser and the bank, when the latter discounted the same, and thereby became the holder of it as for the benefit of the bank. In such a case the contract of endorsement is not to be understood as made where the bill is drawn and the name of the endorser written thereon, unless there delivered to the endorsee, but rather where the endorsement is accepted by a consenting endorsee, who takes the same on faith of such endorsement.²

The Place of Making not the Place of Delivery. But, although the liability of an endorser of commercial paper is governed by the *lex loci contractus*, or law of the place where the endorsement is made, yet the endorsement is not complete until delivery thereof, and also of the note or paper itself to those to whom it is intended to become obligatory. Therefore, the place of making the endorsement is that at which the delivery of the note and endorsement occurs, so that if a note be written in one State, and an endorsement be there written thereon, and it remains in the hands of the maker, and delivery to the payee afterward takes place in another State, the latter State is the place where the instruments are made, as the contracts of maker and endorser are only completed by delivery. In such case, the *lex loci* of

¹ *Chatham Bank v. Allison*, 15 Iowa, 357; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Thorp v. Craig*, 10 Iowa, 461.

² *Chatham Bank v. Allison*, 15 Iowa,

357; *Freese v. Brownell*, 35 N. J. Law, 286; *Campbell v. Nichols*, 33 N. J. Law, 81; *Daniels on Neg. Instruments*, § 868.

the place of delivery becomes the law of the contract, as well in regard to the principal instrument as to the endorsement, and the validity and obligation of both are governed thereby.¹ Such being the law, it follows that, if by the law of the place of delivery an endorser becomes a joint promiser, he is liable as such without demand or notice.²

A draft drawn on a person of another State than where drawn, and by the drawee accepted, and then returned to the drawer to be there negotiated for his benefit, as an accommodation acceptance, with an understanding as between the drawer and acceptor that the drawer should pay the same, is, until negotiated, not a binding contract. The drawer is substantially the agent of the acceptor, to put the same upon the market and realize for his, the drawer's, benefit, the proceeds thereof. When it falls into the hands of a *bona fide* holder at the place where drawn, it becomes a perfected contract, and not until then. It is therefore to be considered, both as to the drawing and acceptance thereof, as a contract made in the State wherein it is drawn, and is to be governed, as to its validity and meaning, by the laws of such State, notwithstanding the *acceptance* is *written* in a different place and State.³ If, by the laws of the State where the draft is thus *drawn* and *negotiated*, the transaction is valid, an innocent holder may recover thereon.⁴ And though such draft be made payable in a different State merely to give it currency as between drawer and acceptor, but in reality intended to be paid where made, and though it calls for a greater rate of interest than is allowable at such designated place of payment, yet if such rate be allowable by the law of the place of the contract, it may there be enforced.⁵

Acceptor. The same law which governs the maker of a note governs the acceptor. By acceptance he becomes, in fact, a promisor, and the draft thus accepted, his promissory note. If, therefore, the draft be payable at a particular place, by his acceptance he subjects himself to the law of the place of performance.⁶

Notice of Dishonor. Thus, the law of the place where the endorsements are made, being the law of the contract of endorse-

¹ Lawrence v. Bassett, 5 Allen, 140.

⁵ Ibid.

² Ibid.

³ Tilden v. Blair, 21 Wall. 241.

⁶ Freese v. Brownell, 35 N. J. Law, 286; Everett v. Vendryes, 19 N. Y. 436; Daniel on Neg. Instruments, § 896.

⁴ Ibid.

ments, therefore, if nothing appear to the contrary, such law governs as to the liability of the endorser,¹ it follows, that where a party endorses in one State commercial paper which is payable in another State, notice of dishonor must be in accordance with the law of the State where the paper was endorsed.²

Protest. The law governing protest is regulated by the law of the place of the performance or acceptance. If, therefore, the drawee refuses acceptance, the law of the place where such refusal is made governs.³

Notice. Change of Residence of Maker. No notice or presentation for payment is necessary to charge the endorser of negotiable paper generally, if before maturity the maker changes his residence to another State, and there resides when the paper becomes due. Presentation and demand in such case at the maker's late residence would be unavailing, and are therefore not required.⁴

Rate of Interest. In an action on a promissory note, or other contract for the payment of money, the action being in the court of a different State than that wherein the contract was made, and the contract being payable generally, without specifying a place of payment or rate of interest, then interest is to be allowed according to the law where the contract was made, if the place of payment be apparent from the instrument, or pleadings and evidence, and is in a different State than the State in which suit and recovery occurs.⁵

If, on the other hand, the instrument sued on is payable in the State where the suit is pending, or in some other State than that wherein it was made, and is silent as to the rate of interest, then interest is to be allowed in accordance with the law

¹ *Huse v. Hamblin*; *Same v. McDaniel*; *Same v. Flint*, 29 Iowa, 501; *Thorp v. Craig*, 10 Iowa, 461.

² *Huse v. Hamblin*, 29 Iowa, 501, 504; *Williams v. Wade*, 1 Met. 82; *Dow v. Rowell*, 12 N. H. 49; *Allen v. Merchants' Bank*, 22 Wend. 218; *Yeatman v. Cullen*, 5 Blackf. 240; *Dunn v. Adams*, 1 Ala. 527; *Russell v. Buck*, 14 Vt. 147; *Aymar v. Sheldon*, 12 Wend. 444; *Danielis on Neg. Instruments*, § 910.

³ *Story's Conf. of Laws*, §§ 360, 631.

⁴ *Foster v. Julien*, 24 N. Y. 28; *Anderson v. Drake*, 14 John. 114; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Gist v. Lybrand*, 3 Ohio, 307; *Duncan v. McCullough*, 4 S. & R. 480; *Reid v. Morrison*, 2 W. & S. 401; *Gillespie v. Hannahan*, 4 McCord, 503.

⁵ *Smith v. Smith*, 2 John. 235.

of the State wherein it purports to be payable; and this, too, if made in the place or State where suit is brought, but is payable in some other State; for, as a general rule, be the suit and recovery wherever it may, the rate of interest is to be computed in accordance with the legal rate where it is payable, if made in one State and payable in another.¹ But the parties may agree at pleasure by stipulating in the contract, for the rate of interest in the place where it is made, or where performable.²

Usurious Contract. If both by the law of the State where the instrument is made and the law of the State wherein payment is to be made, the contract be usurious, then the effect of such usuriousness is to be decided by the law of the place of the making thereof.³ If a contract is usurious where made, but valid where performable, the latter law governs.⁴ So, also, if the contract is good where made it will be enforced by the courts of another State, even though the contract would have been usurious had it been there entered into.⁵ If the effect be a *forfeiture* by the statute, yet the forfeiture is enforceable in the *forum* where suit is brought, notwithstanding the doctrine that courts will not enforce penal statutes of a different or foreign State; for such provision of *forfeiture* is not a provision for a penalty, but merely resists so much of the *validity* of the contracts, and acts only as a restriction of the amount recoverable, and in that respect is rightly referable to the law of the place where the contract is made.⁶

In actions in the United States circuit courts, sitting in any

¹ *Butters v. Olds*, 11 Iowa, 1; *De Wolf v. Johnson*, 10 Wheat. 367; *Campbell v. Nichols*, 33 N. J. Law, 81. But if the interest is adjudged by the court merely as damages, and not as interest under the contract, the rate will be governed by the *lex fori*. *Ayres v. Audubon*, 2 Hill, (S. C.) 601.

² *Butters v. Olds*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Smith v. Smith*, 2 John. 236; *Thompson v. Ketcham*, 4 John. 285; *Cox v. United States*, 6 Pet. 172; *Peck v. Mayo*, 14 Vt. 33; *Parsons' Mer. Law*, 321; *Richards v. Globe Bank*, 12 Wis. 692; *Newman v. Kersham*, 10 Wis. 333; *Vliet*

v. Camp, 13 Wis. 198, 221; *Daniels on Neg. Instruments*, § 922.

³ *Arnold v. Potter*, 22 Iowa, 194.

⁴ *Junction Railroad Co. v. Ashland Bank*, 12 Wall. 226; *Duncan v. Helm*, 22 Lu. Ann. 418; *Miller v. Tiffany*, 1 Wall. 298; *Kennedy v. Knight*, 21 Wis. 340.

⁵ *Levy v. Levy*, 78 Penn. St. 507; *Phila. Loan Co. v. Towner*, 13 Conn. 249; *De Wolf v. Johnson*, 10 Wheat. 367.

⁶ *Arnold v. Potter*, 22 Iowa, 94; *Barnes v. Whitaker*, 22 Ill. 606; *Smith v. Mead*, 3 Conn. 253.

State, the laws of such State regulating interest on judgments are in that respect the law of the United States courts, if no particular interest be contracted for.¹

Defenses. To an action on a note which is both made and payable in one and the same State, the same defense (provided it is not statutory) is allowable, when sued in another State, that might have been made to it if sued in a court of the State where made.²

Thus, where a note is made and is payable in a State where by law defenses of payments, want of consideration, discounts, and sets-off accruing prior to notice of endorsement, and all of which affect the substance of the contract, are allowed, then the same defenses may be relied on under similar circumstances in a suit in the court of a different State,³ but matters of defense which are merely local, which go to the form of the contract and are not a part of it, procedure, parties and time, being legal as well as equitable, defenses are governed by the *lex fori*.⁴

Foreign Bills of Exchange Subject to Jurisdiction of United States Courts. The provision of the act of Congress of 1789, which declares that no district or circuit court shall have "cognizance of any suit for the recovery of the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover said contents, if no assignment had been made, except in case of foreign bills of exchange,"⁵ does not in its restrictive or inhibitory features apply to the endorsees or assignees of bills of exchange drawn in one State upon a person in another, and made payable in such latter State. Such bills of exchange partake of the character of foreign bills, and are to be so treated;⁶ for although the States and citizens thereof are one, as for all national purposes embraced in the Federal Constitution, and are united under the same sovereign authority, and are governed by the same laws, yet in all other respects the States are foreign to and independent of each other.⁷ Upon the principle, then, that such instruments

¹ Sneed v. Wister, 8 Wheat. 690.

² Brabston v. Gibson, 9 How. 263; Story's Conf. of Laws, § 330 *et seq.*

³ *Ibid.*

⁴ Daniels on Neg. Instruments, § 890; Davis v. Morton, 5 Bush, 160;

Jones v. Jones, 18 Ala. 248; Ruggles v. Keeler, 3 John. 261.

⁵ Sheldon v. Sill, 8 How. 441.

⁶ Buckner v. Finley, 2 Pet. 586.

⁷ Warder v. Arell, 2 Wash. (Va.) 298; Buckner v. Finley, 2 Pet. 586.

are foreign bills, it results that although a bill be drawn in favor of a citizen of the same State with the drawer, but on a citizen of another State, so that suit would not lie in favor of the payee in the United States circuit court, yet the endorsee or assignee thereof, who is a citizen of a different State than that of the drawer, may sue the drawer thereon in the Federal courts.¹

But if at the time of making the note or other negotiable instrument for payment of money, (except foreign bills of exchange,) the maker and payee were both citizens of the same State, so that a suit would not lie thereon in the United States court, then no action will lie on such instrument in said court in favor of an assignee or endorsee thereof,² unless at the time of making the assignment or endorsement by the payee, he had become, and then was in good faith a resident and citizen of a different State than the one of which the parties were citizens at the time of the making of the contract. But if the payee, before parting with the instrument has become qualified to sue in the Federal court, then his assignee, if qualified in point of citizenship, may sue, for the assignee of negotiable paper may maintain suit thereon in the United States circuit court, against a citizen of another State than that whereof such assignee is a citizen, notwithstanding that at the time of making the note the parties thereto were both citizens of the same State, if the payee and assignee thereof was a citizen of a different State from that of the maker at the time of assigning the note, so that an action in said court might at that time have been maintained by himself against the maker. For if such payee becomes in good faith a citizen of another State after the making of the note and before parting with the same, then the capacity to sue in the United States district court inures to him, by virtue of such citizenship, and by an assignment of the note to a citizen of a different State from that of the debtor, the same right of action passes to the assignee. Such a case is not within the exception in the act of Congress in regard to jurisdiction of suits by assignees of promissory notes.³

¹ *Buckner v. Finley*, 2 Pet. 536.

² *Kirkman v. Hamilton*, 6 Pet. 20.

³ *Gibson v. Chew*, 16 Pet. 315.

X. MORTGAGE LIEN.

Follows the property in other States. A chattel mortgage of property duly executed and recorded in one State, so as to confer right of possession of the property in the mortgagee, is equally good and binding in every other State in which the property may come. The *lex loci contractus* governs the validity, nature and force of such a contract, and the right of possession or lien conferred thereby upon the mortgagee follows the property not only everywhere within, but also everywhere without the particular sovereignty or State wherein the contract is made and the property is at the time; and these rights will be enforced, in the judicial *forum*, in such other jurisdictions or States, to the same extent and obligation as in the State where the transaction arises, and that a purchase may have intervened from one seemingly the owner does not alter the case.¹

Right of possession enforced. When, by the terms of such mortgage, the right has accrued to the mortgagee of actual possession of the property, that right may be enforced by an action of replevin or other proper action for obtaining possession, in whatever State the mortgaged property may then be; and it is no answer thereto that no evidence or notice existed of record, or was otherwise given, to charge a purchaser therein with notice of the mortgage.² But the court say, in the case above cited, in answer to such an objection, and the liability of buyers to be imposed upon, that "this may be so, but the same argument would be just as true and forcible if the instrument were of record in some distant county of this State."³

A mortgage of a vessel regularly made and recorded under the laws of the United States, in the office of the proper collector, although possession be not given to the mortgagee, is not affected as to its validity by any State law in reference to the filing or recording mortgages of personal property made or taken under the

¹ Smith v. McLean, 24 Iowa, 322; Arnold v. Potter, 22 Iowa, 198; Savary v. Savary, 3 Iowa, 272; Bank of U.S. v. Donnally, 8 Pet. 361; Davls v. Bronson, 6 Iowa, 410, 424; Jones v. Taylor, 30 Vt. 42; Offutt v. Flagg, 10 N. H. 50; Ferguson v. Clifford, 37 N. H. 87;

Blystone v. Burgett, 10 Ind. 28; Barker v. Stacy, 25 Miss. 477; Ryan v. Clanton, 3 Strob. 412, 471; Herman on Chattel Mortgages, §§ 79, 80.

² Smith v. McLean, 24 Iowa, 322, 330, 331.

³ Ibid.

laws of the State. The congressional acts on the subject of recording and effect thereof are no exclusion of State legislation on the same subject.¹

Mortgage in one State; property in another State. But the lien of a mortgage made in one State by a person resident and citizen thereof, on personal property situated at the time in another State, in which latter State the law requires the recording of such instruments, or else that possession be given before levy of attachments or executions thereon as essential to priority, is overcome by the priority of an attachment levy of the same property in a proceeding *in rem* against it made before the recording of such mortgage, before delivery of possession of the property in pursuance thereof.² Though it is true that the validity of a contract is governed, as a general principle, by the law where made, yet it is not so if such conclusion conflict with the rights of others, where the property is situated, or with the laws of the State of its actual *situs*.³ Therefore, a mortgage made in New York on personal property situated at the time in Illinois, is postponed in favor of an attachment levy of the same property in a proceeding *in rem*, and by a subsequent condemnation thereof in sale in such proceeding. The title of the purchaser relates back to the date of the attachment levy, and takes precedence of transfers or liens unrecorded at that time, and without change of possession of the property in the debtor.⁴ Though, for some purposes, a fiction of law prevails that personal property attends the owner, and that transfers of it by him, valid at his domicile, and there made, are valid in such other State as the property may at the time be situated in. But this is only as against the vendor, or volunteers, and not as against intervening *bona fide* claims arising under the law of the actual *situs*. To these, this *fiction* gives place or yields. It is only by comity that such contracts made in one State, when valid there, are enforceable at all in another State; therefore, when their enforcement conflicts with rights acquired

¹ Aldrich v. Ætna Company, 8 Wall. 491.

² Green v. Van Buskirk, 7 Wall. 139; Milne v. Morton, 6 Binn. 361; Taylor v. Boardman, 25 Vt. 581; Emerson v. Patridge, 27 Vt. 8; Ward v. Morrison, 25 Vt. 593; Norris v. Mumford, 4 Martin, 20; Lanfear v. Sumner, 17 Mass.

100; Green v. Van Buskirk, 5 Wall. 307; Guillander v. Howell, 35 N. Y. 657.

³ Green v. Van Buskirk, 7 Wall. 139; Guillander v. Howell, 35 N. Y. 657.

⁴ Green v. Van Buskirk, 7 Wall. 139; Golden v. Cockerill, 1 Kansas, 259.

under the latter's own law that comity ceases to exist in the particular case.¹

Foreign mortgage of land to prefer creditors. Assignments. A mortgage to secure a *bona fide* debt, duly executed and recorded in Iowa, upon lands in that State, and made by a non-resident debtor, in view of insolvency, is not affected by the fact of the same debtor making, on or about the same day, in another State wherein he resides, a general assignment of all his property in the latter State for benefit of his creditors.² By the laws of Iowa, a failing debtor may make a mortgage to secure a particular creditor, and the same will not be held invalid by reason of his failing condition;³ and such is none the less the rule if the debtor be a citizen or a resident of another State.⁴ The effect of the assignment in the State where that is made, under the laws of that State, as to validity or invalidity thereof, will have no influence or bearing upon the validity of the mortgage in Iowa.⁵ It may be stated, as a general rule, that where a foreign assignment conflicts with the local law, the latter will prevail. So that land attached where situated subsequent to a foreign assignment will prevail.⁶

Railroad mortgage. A mortgage of a railroad is valid, though executed by the president in a different State than that where the railroad corporation exists, if its execution be otherwise sufficient and is authorized by the directory, although the vote of authority be silent as to the place where it shall be executed.⁷ And such mortgage, if shown on its face to be so intended, may legally call for the rate of interest allowable where the road is situated, although it is a higher rate than that allowed where the mortgage is executed.

XI. LABORERS' LIEN ON INTER-STATE RAFTS.

Rafts of lumber floated out of one State into another, in which latter State a lien on rafts of lumber is given by law to laborers assisting to run such rafts, become liable to the laborers'

¹ Green v. Van Buskirk, 7 Wall. 139, 150, 151.

² Lyon v. McIlvaine, 24 Iowa, 9.

³ Lamson v. Arnold, 19 Iowa, 479; Lyon v. McIlvaine, 24 Iowa, 9.

⁴ Lyon v. McIlvaine, 24 Iowa, 9.

⁵ Lyon v. McIlvaine, 24 Iowa, 9.

⁶ Burrill on Assignments, § 304; Story's Conf. of Laws, §§ 327, 423 a.

⁷ Cheever v. Rutland & Bur. R. R. Co., 39 Vt. 653.

lien on arriving in such latter State for whatever sum of money may be due them, and the same will there be enforced, if applied for, on arrival of such rafts at the destined port in such State for which they started.¹ Nor will it alter the case as to the right of the lien, that the owner of the raft contracts with another person to make the run at his own expense to the destined point; the laborers are none the less entitled thereto, if there is no agreement with them to the contrary.²

XII. CONTRACTS OF AFFREIGHTMENT.

Contracts for *inter*-State affreightment, valid in the State where made, are valid elsewhere if not in contravention of the law of such other place or places,³ and when made by a consignor of goods delivered for carriage, are binding on the consignee of another State the same as if made by himself.⁴

Existing rights of shippers, attached to freight consigned for *inter*-State carriage, are not prejudiced by the property being carried into another State.⁵

A bill of lading and contract of shipment made in one State for the shipment and transportation of property to a point in another State, and on the faith of which advances are made in the State where the transaction occurs, is a contract governed by the laws of the State where made, if between citizens of such State.⁶ The person thus making the advances on the bill of lading becomes the legal owner of the property—not absolutely—but as security for the reimbursement of his advances.⁷ The obligation to reimburse the advances is in legal effect, and in the

¹ *Hanson v. Hiles*, 34 Iowa, 350.

² *Ibid.*

³ *Robinson v. Merchants' Dispatch*, 45 Iowa, 470; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1.

⁴ *Robinson v. Merchants' Dispatch*, 45 Iowa, 470; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1.

⁵ *Story's Conf. of Laws*, §§ 401, 402, 402 *a*; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1.

⁶ *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34.

⁷ *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Bailey v. Hudson R. R. Co.*, 49 N. Y. 70; *Dows v. Greene*, 24 N. Y. 638; *Liekbarron v. Mason*, 2 T. R. 63, and *Hare & Wallace's Notes to Smith's Leading Cases*, vol. 1, 7th ed. pp. 1147, 1227; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631.

absence of any other understanding, an obligation to make such reimbursement at the same place where the advancement is made.

Bills Drawn on Consignee. This, too, although bills are drawn on the consignee in favor of the person making the advances, and for the purpose of reimbursing the same. The effect intended is repayment there by means of such bills, and the law of the place governs the transaction.¹ When the reimbursement is completed, the ownership then is in the person thus secured, no longer for his own security, but in trust for the consignee or real owner of the property.²

Affreightment Contracts by Foreign Corporations. Contracts of affreightment or carriage made in one State by a railroad corporation of another State, and to be performed in the latter State, are governed, as to performance, by the laws of the latter State,³ and the fact that a part of the carriage is across an intermediate State boundary river, over which both States possess the right of navigation and used by their respective inhabitants, does not alter the case in law.⁴

XIII. WAREHOUSE RECEIPTS.

The transfer, by delivery and endorsement of warehouse receipts, in one State, for goods stored in a warehouse of a different State in the ordinary course of commerce, is a transfer of the goods, as actual delivery is impracticable, and will, where the transaction is a *bona fide* one, hold over process of attachment against the person making the transfer, although such change of ownership and transfer be unknown to both the warehouseman and the plaintiff in attachment. The force thereof is like the transfer of a ship at sea—delivery is impracticable. Such transactions are a necessity of internal trade and result from the usages thereof.⁵

¹ First Nat. Bank of Toledo v. Shaw, 61 N. Y. 283, 292; Boyle v. Zacharie, 6 Pet. 635, 644; Lanussee v. Barker, 3 Wheat. 101; Grant v. Healey, 3 Sumn. 523.

² First Nat. Bank of Toledo v. Shaw, 61 N. Y. 283, 292, 294; Allen v. Will-

iams, 12 Pick. 297; City Bank v. Rome, W. & O. R. R. Co., 44 N. Y. 136.

³ Brown v. Camden & Atlantic R. R. Co., 83 Penn. St. 316.

⁴ Ibid.

⁵ Gibson v. Stevens, 8 How. 334.

XIV. STOPPAGE IN TRANSITU.

Inter-State Consignments. In cases involving the right of stoppage *in transitu* of *inter-State* consignments of property to be carried by common carriers out of one State into or through another, or into or through still another State or States, the personal right of the consignor to thus stop and reclaim the property is not prejudiced by its passing out of one State, into or through another State or States, but follows the property wherever it goes until delivery to the consignee, and may be enforced in every such other State into which the goods are carried.¹ This right will override the claim of intervening purchases made of the consignee, as also levies against him during the transit, to the same extent as it would in the State wherein the consignment is made.² But the prevailing idea that the carrier is bound to deliver up the goods on mere claim of the consignor to have the same, and at any and every place at which the goods may arrive, or which they may in their transit pass, or else subject himself, on refusal, to an action for conversion of the same, is altogether erroneous. While there is no want of authority to show that the consignor is entitled, under proper circumstances, to reclaim the goods, and to have possession thereof, yet we have been unable to find any decision imposing upon the carrier the duty of personally knowing the consignor, so as to be truly advised of his identity, or charging the carrier with knowledge of the facts on which the right of stoppage *in transitu* rests in each particular case, or compelling the carrier to become judge, jury and administrator of the law in each particular case, and as a sequence thereto to deliver up the property to whoever shall assume to have such rights and shall give notice thereof and demand the property, on peril of the carrier being deemed to have converted the goods to his own use in case of refusal, or, of what is still worse, of being chargeable in damages worth the value thereof to the *consignee*, in case of such delivery to a wrong claimant, or even to the right person, but when no real cause for stoppage *in transitu* exists.

¹ Story's Conf. of Laws, §§ 401, 402, 402 a; *Englis v. Usherwood*, 1 East. 515; *Redfield on Carriers*, § 238 *et seq.*;

Desty's Shipping and Admiralty, §§ 228, 229.

² Story's Conf. of Laws, § 402.

On the contrary, this right is to be enforced as other rights are enforced; that is, through the courts and officers of the law. The carrier is but a stakeholder between the consignor and consignee, and is not bound to know the consignor *personally*; is not bound to know whether the goods were consigned or not on a purchase and sale thereof, or if so, whether or not the purchase money was paid or an indebtedness was incurred therefor; or, if the latter was the case, is not bound to know whether the debtor was then or since has proved insolvent, or whether the goods were obtained by fraud, or the facts as to any cause which in law is ground for *stoppage in transitu*.

Remedy by Replevin. The remedy of the consignor, if he has rights in such respect, is by *process of replevin* against the carrier to obtain possession of the goods, and the only effect of *notice* to the *carrier* is to prevent the latter from delivery of the same to the consignee until reasonable time is elapsed for the consignor to assert his rights.¹ And we hold further, that in such case, although the carrier be made defendant, yet if he act in good faith, and do no more than to avoid committing himself, he will not even be liable for costs. In such actions, however, the carrier should notify the consignee thereof, if not already made a party, and disclaiming other interest than as carrier, move to substitute the consignee as defendant in his stead, that, as the real parties in interest they may interplead.²

Bill of Interpleader. But the safer way for the carrier, in cases of doubtful right of the respective claimants to have delivery of the goods, and which must often if not always be the result of *inter-State* shipment over long lines of carriage, whenever conflicting claims arise as growing out of the right of *stoppage in transitu*, is to place the goods in the hands of a reliable bailee, and file against the claimants and parties in interest a bill of interpleader, to settle the rights of the parties in that respect, and thereby protect the carrier from the hardship of deciding to whom the right of delivery belongs.³ Chancellor KENT, in recognition of the injustice of a rule that would impose upon

¹ Houston on *Stoppage in Transitu*, 51; Abbott on Shipping, 511 *et seq.* The notice places the goods *quasi in custodia legis*. Abbott on Shipping, 528.

² Abbott on Shipping, 511 *et seq.*

³ 3 Kent, *215, *216; Jordan *v.* James, 5 Ham. 88, 107.

the carrier, in disputed cases of *stoppage in transitu*, the necessity of deciding, at his own risk, to whom the right of delivery belongs, says that the carrier ought not to be put to such peril, or to the uncertainty of indemnity,¹ but "should know to whom of right he can deliver the goods," and that it "is safer for the master to deposit the goods with some bailee until the rights of the claimants are settled, as they can always be, upon a bill of interpleader in chancery, to be filed by the master."²

XV. INVIOLABILITY OF CONTRACTS.

No State can pass a law impairing the obligation of contracts. All such State laws are simply void.³ But what amounts to impairing the obligation of a contract, within the meaning and intent of the constitutional provision above referred to, has been the subject of much discussion, and the earnest consideration of our national courts, in whom alone, under the Constitution, the decision rests. The decisions are uniform, however, that the invalidity of a State law does not depend upon the degree or extent to which it modifies or changes the rights and obligations of the parties to a contract, or impairs, in any manner, a contract; but a State law is void that does it at all.

Such, too, is the case, whether it be by mere statutory enactment, or by a provision or clause of a State constitution; for it is not merely the *legislatures* of the States, but the *States* themselves, that are thus inhibited by the national Constitution.⁴

¹ 3 Kent, *215, *216.

² *Ibid.*

³ Article 1, § 10, Const. of U. S.; *Fletcher v. Peck*, 6 Cr. 87; *Pawlet v. Clark*, 9 Cr. 272; *Terrett v. Taylor*, 9 Cr. 43; *McGee v. Mathis*, 4 Wall. 143; *Thompson v. Holton*, 6 McL. 386; *New Jersey v. Wilson*, 7 Cr. 164; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Dodge v. Woolsey*, 18 How. 331; *State Bank of Ohio v. Knoop*, 16 How. 369; *Providence Bank v. Billings*, 4 Pet. 514; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Hawthorne v. Calef*, 2 Wall. 10; *Corning v. McCullough*, 1 N. Y. (47, 49); *Conant v. Van Schaick*, 24 Barb. 87; *The*

Binghamton Bridge, 3 Wall. 51; *Green v. Biddle*, 8 Wheat. 1; *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464; *Cooley on Const. Limitations*, 4th ed. 333 *et seq.*; *Pomerooy on the Constitution*, 3d ed. 349-413; *Story on the Constitution*, §§ 1374-1400; *Sedwick on the Construction of the Constitution*, 603 *et seq.*; *Smith on Statutory Construction*, 382 *et seq.*

⁴ *Green v. Biddle*, 8 Wheat. 1; *New Jersey v. Wilson*, 7 Cr. 164; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Terrett v. Taylor*, 9 Cr. 43; *Sturges v. Crowninshield*, 4 Wheat.

There May be Change of Remedy. The legislature may in good faith, regulate the remedy by general laws, but not to such an extent as to affect or impair the obligation of the contract.¹

Rebellious States are within the prohibition. This inhibition extends not only to States confessedly acting within the national union as professed members thereof, but also to the enactments of States that have nominally seceded therefrom, and are professedly acting as integral parts and members of an unlawful and rebel-political organization; so that, although the merely domestic action of such erratic States may be enforcible for the protection and good order of society, when free from constitutional objections, yet statutes thereof which are incompatible with the national constitution will be held void by reason thereof, when brought in question after the suppression of such hostile organizations, upon the same principle and to the same extent as if enacted by loyal States; and this, too, as well in relation to laws impairing the obligations of contracts as to other unconstitutional enactments.² In like manner all enactments of such principal rebel government itself will be recorded as illegal and void, and so of judicial order and decisions made in virtue thereof.³

Cases in illustration. Personal liability for corporate debts. Release of by law. A provision in the charter of a private corporation rendering stockholders liable to the amount of their stock for all debts of the corporation contracted prior to the transfer of their stock, is a contract between such stockholders and the creditors of the corporation, which is impaired by a law subsequently passed repealing such individual liability clause of the charter.⁴

Bank bills receivable, by law, for taxes. So, where a bank charter made the bills of the bank receivable by the State in pay-

122; *Mason v. Haile*, 12 Wheat. 370; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Hawkins v. Barney's Lessee*, 5 Pet. 456; *Farmers' and Mechanics' Bank v. Smith*, 6 Wheat. 131; *Satterlee v. Matthewson*, 2 Pet. 380; *Wilkinson v. Leland*, 2 Pet. 627; *Hawthorne v. Calef*, 2 Wall. 10; *McGee v. Mathis*, 4 Wall. 143; *Fletcher v. Peck*, 6 Cr. 83; *Dodge v. Woolsey*, 18 How. 331; *Cooley on Const. Limitations*, 4th ed. 333 *et seq.*; *Pomeroy*

on the Constitution, 3d ed. 349-413; *Story on the Constitution*, §§ 1374-1400.

¹ *Bronson v. Kinzie*, 1 How. 311; *Hawthorne v. Calef*, 2 Wall. 23; *Ogden v. Saunders*, 12 Wheat. 270; *Beers v. Haughton*, 9 Pet. 329; *Cooly's Const. Limitations*, 4th ed. 351.

² *Williams v. Bruffy*, 6 Otto, 176.

³ *Dewing v. Perdicaries*, 6 Otto, 193.

⁴ *Hawthorne v. Calef*, 2 Wall. 10, 23.

ment of taxes, this was held to amount to a contract with the holders of the bills; and it was further held that an act of assembly repealing such provision was void, as impairing the obligation of the contract.¹

An exclusive privilege is a contract. So, a provision in a State statute chartering a company to build a toll bridge, that no bridge over the same stream should be built within a given distance from the one thus authorized to be built, is a contract between the corporators and the State, which is impaired by the building of another bridge over the same stream within the inhibited distance, and by act of the legislature permitting the erection of such latter bridge, and such subsequent statute is void as repugnant to the Constitution of the United States, which declares that no State shall make any law impairing the obligation of contracts.²

Purchases under State exemption from taxation. Likewise the sale of lands by a State, or scrip receivable for lands under a statute providing as an inducement to the purchase that the lands should not be taxed for a given number of years, or until reclaimed from their condition as swamp lands, amounts to a valid contract between the State and the purchaser or holder of the scrip or lands, which is irrevocable by the State; and the enactment subsequently of a law repealing such exemption clause and providing for taxing such lands, before the expiration of the time specified, or reclamation of the land from their swamp land condition, impairs the contract within the meaning of the Constitution, and is therefore unconstitutional and void.³

Curative laws. But curative laws, making contracts valid, do not impair the obligation of contracts.⁴

Bank charter exemption from taxation for bonus paid. But a State law which, in consideration of a *bonus*, embodies in a bank charter a provision exempting the bank from taxation, is a contract inhibition against taxation of the stockholders of such bank, upon their stock therein; and a law creating such tax is void for impairing the contract. Yet such inhibition does not extend or exist longer than the term of the charter, and if thereafter the

¹ Woodruff v. Trapnall, 10 How. 190.

³ McGee v. Mathis, 4 Wall. 143.

² The Binghamton Bridge, 3 Wall.

⁴ Satterlee v. Matthewson, 2 Pet.

charter be renewed without such provision, there is no longer such restriction as to taxation as to the bank or its stocks.¹

Laws affirming invalid and doubtful contracts. But State laws making valid irregular and doubtful, or even void, contracts, not thereby affecting injuriously contract rights of third persons, are not laws impairing the obligations of contract within the meaning of the United States Constitution.²

Legal dissolution of private corporations. Nor does the dissolution of a private corporation by authority of an existing State law or laws providing therefor, and for closing up its concerns, operate as against the corporation creditors as an impairment of their contract of indebtedness. The obligation of those contracts continues, and are enforceable against the assets of the defunct corporation, and they could reach nothing else if the corporation had not dissolved.³ Every creditor is supposed to know the nature of such corporations, and their liability to dissolution, voluntary or forced, and to contract with it in reference thereto. Creditors, in such case, must look to the corporate assets, which will be liable so far as not transferred into the hands of *bona fide* purchasers. The case is no harder than that of creditors of a *natural* person who dies. They, too, must look to the assets for satisfaction of their demands. If there are no assets in either case, yet the contract obligation still remains, and is in no wise impaired.⁴

Existing Laws Enter into Contracts. The laws of a State existing at the time of making a contract enter into it as a part thereof, so far as regards its force and obligation; and its judicial enforcement by judgment or decree, and process of the courts; hence, subsequent laws requiring property levied on and offered for sale, or offered for sale under decree of the courts, to be appraised, and requiring bids of two-thirds the appraised value as a condition prerequisite to a sale, superadds a condition unknown to the contract, and obstructs and impairs the obligation of the same, and is therefore void. The Supreme Court of the United States have held that the obligation of a contract is to perform the promises and undertakings contained therein; the right of

¹ *Gordon v. The Appeal Tax Court*, 3 How. 133; *Ches. v. The Appeal Tax Court*, 3 How. 133; *Dodge v. Woolsey*, 18 How. 331.

² *Watson v. Mercer*, 8 Pet. 88; *Satterlee v. Matthewson*, 2 Pet. 380.

³ *Mumma v. Potomac Co.*, 8 Pet. 281.

⁴ *Ibid.*

the obligee to bring suit, obtain judgment, and take out final process thereon, and enforce it until satisfied, pursuant to the substantial features of the existing law, and that if such law allows a sale of property for what it will bring, that a subsequent law prohibiting a sale unless for a named proportion of its value, is, as stated, void, for impairing the obligation of the contract.¹

So, where the charter of a bank declared it "capable and able, in law, to have, possess, receive, retain, and enjoy, to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind soever, nature, and quality, * * * and the same to grant, demise, alien, or dispose of for the good of" such bank; and "to receive money on deposit, and pay away the same free of expense, discount bills of exchange and notes," a subsequent law prohibiting the bank from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, was held, inasmuch as the charter privileges so granted amounted to a contract between the State and the bank, an enactment which violated the obligation of the contract, and was therefore unconstitutional and void.²

Abolition of Imprisonment for Debt. A State may pass a law discharging persons imprisoned for debt, and such a law does not impair the obligation of the contract. It merely modifies the remedy, but does not take the remedy away. Imprisonment is no part of a contract of indebtedness, and therefore releasing a prisoner who is held for a debt does not, in any manner, impair the contract creating the debt. The power of a State to impose imprisonment as part of the remedy, also enables it to abolish that part of the remedy generally; and, if it be allowable by a general law, it is also allowable in special cases.³ In *Sturges v. Crowninshield*, here cited, the Supreme Court of the United States say: "Imprisonment of the debtor may be a punishment for not performing his contract, or may be allowed as a measure for inducing him to perform it. But a State may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract,

¹ *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 6 How. 608; *Howard v. Bugbee*, 24 How. 461.

6 How. 301; *State Bank of Ohio v. Knoop*, 16 How. 369.

² *Planters' Bank of Miss. v. Sharp*,

³ *Mason v. Haile*, 12 Wheat. 370; *Sturges v. Crowninshield*, 4 Wheat. 200; *Beers v. Haughton*, 9 Pet. 329.

and simply to release the prisoner does not impair its obligation." Such being the power of a State legislature, it results therefrom that the enactment of a law discharging a prisoner held for debt, on bonds, in the prison bounds, and the going at large of such prisoner beyond said bounds, as the result of such discharge, neither violates the obligation of any contract nor amounts to a breach of condition of the bonds, conditioned that the prisoner shall "continue to be a true prisoner, in the custody, guard and safe-keeping, * * * until he shall be lawfully discharged;" for such a release, by operation of law, is a lawful discharge.¹

State Insolvent Laws. And so it is held that State insolvent laws do not impair the obligations thereafter entered into between the citizens of the States by which they are enacted.²

Taxing a City's Own Indebtedness. An ordinance of a city taxing its own indebtedness, as the property of its non-resident creditor, is illegal, and so is a provision thereof requiring the amount of the tax to be deducted and withheld from the creditor out of the accruing interest on such debt. Such ordinances are void as violating and impairing the obligation of the contract.³ In the language of STRONG, J.: "States and cities, when they borrow money, and contract to pay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals."⁴

XVI. USURY.

This subject has been incidentally treated of in Sec. IX. of this chapter, under the head of "Commercial Paper." As connected with our general subject, it can present itself in either one of three phases: 1st. Where the contract is made in one State, and is performable in another, and the interest contracted for is usurious according to the *lex loci contractus*, but is allowable and valid by the *lex solutionis*, or the law of the place where the contract is to be performed. 2d. Where the interest contracted for is valid by the *lex loci contractus*, but is invalid and usurious by

¹ Mason v. Halle, 12 Wheat. 370;
Beers v. Haughton, 9 Pet. 329.

² Murray v. City of Charleston, 6
Otto, 432.

³ Ogden v. Saunders, 12 Wheat. 213;
Cooley's Const. Limitations, 4th ed.
360 *et seq.*

⁴ Ibid. 445.

the *lex solutionis*. 3d. Where the rate of interest contracted for is allowable by the *lex loci contractus*, and the contract does not specify any place for the performance of the contract, but the interest so contracted for happens to be usurious by the *lex fori*, or the law of the place where the contract happens to be sued upon. And let us now consider the first division. It may be asserted, as a general and now well established doctrine that if the interest is valid by the *lex solutionis*, or the law of the place of performance, notwithstanding it be usurious by the *lex loci contractus*, such contract and interest will be upheld in both States, in the absence of fraud or any intent to evade the law.¹ When parties contract with reference to the laws of a particular State, it is proper that those laws should govern their contract in whatever *forum* the contract is construed or litigated upon. Those laws form an integral part of their contract, and, as a general rule, to hold otherwise, would be a breach of State comity, and the precursor of much confusion. 2d. It should follow, as a necessary sequence of our first classification, that if the *lex solutionis* governs, a contract which provides for interest allowed by the *lex loci contractus*, but which interest is usurious according to the *lex solutionis*, or the place where the contract is to be performed, will be governed by the law of the latter place and the interest will accordingly be construed as usurious.² This doctrine has not, however, received the unanimous concurrence of courts and authors. It having been asserted by some that even though the interest is usurious by the *lex solutionis*, or the law of the place where the contract is to be performed, yet, if the interest is allowed by the *lex loci contractus*, the same would be allowed, because, as is said, "the parties may stipulate the rate of interest of either country, and thus, by their own express contract, determine, with reference to the law of which country that

¹ *Andrews v. Pond*, 13 Pet. 65, 77, 78; *Boyer v. Edwards*, 4 Pet. 111; *Balme v. Wombaugh*, 38 Barb. 352; *Pratt v. Adams*, 7 Paige, 615; *Arnold v. Potter*, 22 Iowa, 194; *Junction Railroad v. Ashland Bank*, 12 Wall. 226; *Parham v. Pulliam*, 5 Cold. 497; *Duncan v. Helm*, 22 La. Ann. 418; *Tyler on Usury*, 81 *et seq.*; *Story's Conf. of Laws*, § 291 *et seq.*; *Wharton's Conf.*

of Laws, § 503; *Burges' Com.*, vol. 3, p. 774; *Foote's Private International Law*, 370; *Westlake's Private International Law*, § 206.

² See cases cited in the preceding, and also *Wharton's Conf. of Laws*, § 504; *Andrews v. Pond*, 13 Pet. 65; *Story's Conf. of Laws*, §§ 290, 304 b; *Tyler on Usury*; *Burges' Com. on Colonial Laws*, vol. 3, p. 774.

incident of the contract shall be decided."¹ We do not, however, regard it as consistent with the doctrine which has been above stated under our first division. Neither do we think that it is consistent with reason that the courts of a State should enforce a contract made to be performed within that State, and which contract, in terms, overrides an express law of that very State.² If, however, the contract was brought before the courts of the State where made, it might be reasonable to suppose that the local court would enforce the interest, inasmuch as the same would be valid by their laws. We think that the doctrine which we have stated is the most consistent and conformable to the general rule. It is true that there are cases which hold that the interest being allowable where the contract is made, will be enforced in the State where payable, even though usurious there, on the ground that the validity of purely personal contracts depends upon the law of their place where made. But we are at a loss to see how this reasoning will apply, when the parties contemplate, as they are presumed to do, by making the contract performable in another State, to contract with reference to those laws. It does not seem for them proper to say that, as to the interest, the *lex loci* shall govern, but as to everything else, time for demand, days of grace, etc., the law of the place of performance shall govern.³ 3d. Where the contract is made performable in any place it will be presumed to be made performable in the place where made. The usury laws, therefore of the *loci contractus* will govern the contract, and wherever the same is construed or litigated upon, the law of the place where the contract was made will govern the

¹ Story's Conf. of Laws, § 304 b. This part of the text, however, it seems, is the work of some one of its numerous editors. Peck v. Mayo, 14 Vt. 33; Depau v. Humphreys, 8 Martin, (N. S.) 1; Chapman v. Robertson, 6 Paige, 629.

² Wharton's Conf. of Laws, §§ 504-510; Story's Conf. of Laws, §§ 291, 298; 2 Parsons on Contract, *584 and note. Thus, it is said, as to an ordinary contract which is to be performed in a State other than where made, that to be enforced, it must be valid, as tested by the laws of the place of perform-

ance. Kanaga v. Taylor, 7 Ohio St. 134; Lewis v. Headley, 36 Ill. 433; Adams v. Robertson, 37 Ill. 45; Davenport v. Karnes, 70 Ill. 465; Evans v. Anderson, 78 Ill. 558; Maguire v. Pin-gree, 30 Maine, 508.

³ For cases which hold different from the text, the reader is referred to Bowen v. Bradley, 9 Abbott, (N. S.) 395; Claves v. Hooker, 4 Hun. 231; Depau v. Humphreys, 8 Martin, (N. S.) 1; Peck v. Mayo, 14 Vt. 33; Pope v. Nickerson, 3 Story, 466; Kilgore v. Dempsey, 25 Ohio St. 413; Bowman v. Miller, 25 Gratt. 331.

interest.¹ The interest reserved on the contract being good in the State where made, will be enforced by the courts of another State, even though, if it had there been entered into, it would have been forfeited or declared void by reason of its own usury laws.²

Forfeitures for usury. Statutory forfeitures for usury in regard to loans or contracts for payment of money bear relation to the remedy.³ Therefore, when such contracts are sued in another State, then, inasmuch as in such other State the remedy is governed by the law of the *forum*, it results, from these conclusions, that in the courts of such other State the forfeiture cannot be enforced; it may only be enforced when suit is pending in the State where the statute exists.⁴

¹ Lee *v.* Selleck, 33 N. Y. 615; Philadelphia Loan Co. *v.* Towner, 13 Conn. 124; DeWolf *v.* Johnson, 10 Wheat. 367; Davis *v.* Garr, 6 N. Y. 124; Robb *v.* Halsey, 11 Sm. & M. 140.

² Cases cited above.

³ Sherman *v.* Gassett, 9 Ill. 521; Lindsay *v.* Hill, 66 Maine, 212.

⁴ *Ibid.*; Barnes *v.* Whitaker, 22 Ill. 606.

CHAPTER IX.

RULES OF PROPERTY AND RIGHT THE SAME IN STATE AND NATIONAL COURTS.

- I. WHEN THE LOCAL RULES OF LAW ARE FOLLOWED BY UNITED STATES COURTS.
- II. BLIND CONFORMITY TO STATE RULINGS NOT REQUIRED OF UNITED STATES COURTS.
- I. WHEN THE LOCAL RULES OF LAW ARE FOLLOWED BY UNITED STATES COURTS.

Except when they conflict with the Constitution and treaties of the United States and acts of Congress, the laws of the several States and well settled rules of property and rights of a local nature of the State courts are recognized, and are ordinarily followed by the United States courts in causes at law, in the respective States where these courts are held, whether the same be the result of statutory enactments, common law usages, or the decisions of highest State courts.¹ Therefore, where, by a State statute, judgments in ejectment, except of non-suit, are a bar to a subsequent action for the same property between the same parties and those claiming under them, it is held that such enactment is alike binding on national and State courts in such State.² The State court constructions of State laws, it was decided in an early and leading case, would be followed in the United States

¹ *Miles v. Caldwell*, 2 Wall. 35, 43, 44; *Christy v. Pridgeon*, 4 Wall. 196, 203; *Shelby v. Guy*, 11 Wheat. 361; *Sneed v. Wister*, 8 Wheat. 690; *Elmendorf v. Taylor*, 10 Wheat. 152; *McCluney v. Silliman*, 3 Pet. 270; *Henderson v. Griffin*, 5 Pet. 151; *Green v. Neal's Lessee*, 6 Pet. 291, 298; *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *Ross v. Duval*, 13 Pet. 45; *Nesmith v.*

Sheldon, 7 How. 812; *Suydam v. Williamson*, 24 How. 427, 433; 1 United States Stat. at Large, 92; Original Judiciary Act, § 34.

² *Miles v. Caldwell*, 2 Wall. 35, 43, 44; *Brine v. Insurance Co.*, 6 Otto, 627; *Orvis v. Powell*, 2 Chicago Law Journal, 190, (Oct. Term U. S. Sup. Ct. 1878.)

courts.¹ The same has often been decided as to State court constructions of their own constitutions.² So, where the decisions of the State courts have been long acquiesced in, and form an established rule of property, they will be followed by the federal courts.³ On questions, however, which do not involve the construction of local laws, but which relate to the construction of instruments, such as deeds and wills, the federal courts do not feel bound by the State decisions.⁴ So, it has been decided that in the construction of State statutes of limitations, the State decisions would be followed,⁵ as well as on the construction of rules of evidence based on State laws.⁶ If the decisions of the State court have been conflicting and changeable, the last decision is generally followed, unless a previous decision of the State court should already have been adopted by the federal courts.⁷ In *Shelby v. Guy*, Justice JOHNSON says: "That the statute laws of the States must furnish the rule of decision of this court as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that that admission may at times involve us in seeming inconsistencies, as where States have adopted the same statutes, but their courts differ in their construction. Yet that course is necessarily indicated by the duty imposed on us, to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess, of what those lights are."⁸

¹ *Luther v. Borden*, 7 How. 1.

² *Secombe v. Railroad Co.*, 23 Wall. 108; *Gut v. The State*, 9 Wall. 35; *Randall v. Brigham*, 7 Wall. 523; *Webster v. Cooper*, 14 How. 488.

³ *Chicago v. Robbins*, 2 Black, 418; *Williams v. Kirtland*, 13 Wall. 306; *Nichols v. Levy*, 5 Wall. 433; *Jackson v. Chew*, 12 Wheat. 153.

⁴ *Lane v. Vick*, 3 How. 464; *Foxcroft v. Mallett*, 4 How. 353; *Chicago v. Robbins*, 2 Black, 418; *Venice v. Murdock*, 2 Otto, 494; *Supervisors v.*

U. S., 18 Wall. 71; *Pine Grove v. Talcott*, 19 Wall. 666.

⁵ *Leffingwell v. Warren*, 2 Black, 599; *Tioga R. R. Co. v. Blossburg & Corning R. R. Co.*, 20 Wall. 137.

⁶ *Ryan v. Bindley*, 1 Wall. 66.

⁷ *Leffingwell v. Warren*, 2 Black, 599. See, also, *Gelpcke v. Dubuque*, 1 Wall. 175.

⁸ *Shelby v. Guy*, 11 Wheat. 367; *Bank of Hamilton v. Dudley*, 2 Pet. 492.

II. BLIND CONFORMITY TO STATE RULINGS NOT REQUIRED OF UNITED STATES COURTS.

But the courts of the United States are not absolutely bound to follow or defer to the State court construction of State Constitution and laws by a blind conformity thereto, although many *dicta* are to be found to that effect.¹ On the contrary, the federal reports show many cases of exception to the rule. Where there is a settled construction of the laws of a State by its highest court, and such construction has become an established precedent, it is the practice of the national courts to accept and adopt it; but where the United States court has first decided the question, it will not feel bound to retrace its course and surrender its judicial conviction by reason of a subsequent contrary State court decision.²

When State court decisions are erratic or inconsistent, the federal court is not disposed to follow the last, if contrary to its own convictions.³ In the case of *Pease v. Peck*, the United States Supreme Court, SQUIER, J., say: "And much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent. Cases may exist, also, when a cause is got in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound, in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision, contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State."⁴

¹ *Pease v. Peck*, 18 How. 595.

² *Pease v. Peck*, 18 How. 595; *Lefingwell v. Warren*, 2 Black, 599; *Gelpeke v. Dubuque*, 1 Wall. 175; *Chicago v. Robbins*, 2 Black, 418.

³ *Morgan v. Curtenius*, 20 How. 1.

⁴ 18 How. 598, 599. See, also, *Morgan v. Curtenius*, 20 How. 1.

CHAPTER X.

ACTIONS AND SUITS ON JUDGMENTS AND DECREES.

- I. ACTIONS ON JUDGMENTS OF OTHER STATES.
- II. ACTIONS ON DECREES OF OTHER STATES.
- III. ACTION IN STATE COURT AND UNITED STATES COURT, ON JUDGMENTS OF EITHER.
- IV. ACTION ON CONDITIONAL JUDGMENTS.
- V. ACTION ON JOINT JUDGMENT.
- VI. ACTION ON JUDGMENT ON PENAL BOND.
- VII. COMPETENCY OF THE RECORD AS EVIDENCE.
- VIII. CHANGE OF STATE SOVEREIGNTY.
- IX. JUDGMENTS AND DECREES IN PROCEEDINGS IN REM.
- X. DEFENSES TO SUITS ON JUDGMENTS.

I. ACTIONS AND SUITS ON JUDGMENTS OF OTHER STATES.

State Court. Actions and suits will lie in the courts of a State upon personal judgments and decrees of the courts of another State for a fixed sum in money, where the court rendering the same had obtained jurisdiction of the defendant in such judgment;¹ and so as to Territories of the United States.²

Courts Take Notice of New States. And where a new State is created by division of an old one, the courts take notice thereof³ and recognize such judgments and decrees, when certified and authenticated by the authorities of the new State having the custody of the record thereof.⁴

Judgments for money being debts of record of the highest grade, actions at law will lie thereon whether they be judgments of the same State, or of a different State, or of a court of the United

¹ *Pennington v. Gibson*, 16 How. 65; *Nation v. Johnson*, 24 How. 195; *Darrah v. Watson*, 36 Iowa, 116; *Danforth v. Thompson*, 34 Iowa, 243; *Woodward v. Willard*, 33 Iowa, 542; *Dennison v. Williams*, 4 Conn. 402; *Ives*

v. Finch, 28 Conn. 112; *Freeman on Judgments*, § 432.

² *Ibid.*

³ *Darrah v. Watson*, 36 Iowa, 116, 118; *Gilbert v. Moline Water Power & Manf. Co.*, 19 Iowa, 819.

⁴ *Darrah v. Watson*, 36 Iowa, 116.

States; and this, too, notwithstanding the plaintiff might have a remedy by execution, or otherwise, in the court where rendered.¹ Thus, an action will lie in a State court upon a judgment of a United States Court for the same district in which the State is situated.²

Judgment Against Non-Resident. And although the defendant in a judgment sued on was not an inhabitant of the State when and where the suit was brought, and in which judgment was rendered against him, yet whether an inhabitant or not, if personally served with the original process in such suit, and within the territorial jurisdiction of the court, or if he voluntarily appears to the same, he thereby becomes personally subject to the jurisdiction and such judgment is a valid cause of action in another State, unless impeached in some manner allowed by law.³ Thus, if there be service without appearance, or appearance without service, jurisdiction of the person attaches, and a judgment *in personam* is valid if by a court of general jurisdiction, and such judgment will be treated in the courts of others of the States as entitled to full faith and credit under the United States Constitution and laws, when so authenticated as to bring it within their provisions.⁴ And though the service be insufficient in manner, yet if received and acted on as service by the court, it is mere matter of error and not of invalidity, and is binding until reversed or set aside.⁵ The authorities here cited

¹ Pennington v. Gibson, 16 How. 65; Houghton v. Raymond, 1 Sandf. 682; McGuire v. Gallagher, 2 Sandf. 402; Church v. Cole, 1 Hill, 645; Burton v. Stewart, 11 Ind. 238; Ames v. Hoy, 12 Cal. 11; Canfield v. Miller, 13 Gray, 274; White River Bank v. Downer, 29 Vt. 332; Chandler v. Warren, 30 Vt. 510; Freeman on Judgments, § 432.

² Davidson v. Nebaker, 21 Ind. 334.

³ Darrah v. Watson, 36 Iowa, 116; Bissell v. Briggs, 9 Mass. 462; Danforth v. Thompson, 34 Iowa, 243; Woodward v. Willard, 33 Iowa, 542. But jurisdiction of defendant's person, so as to justify the rendering of a personal judgment, cannot be had by service of a process on him in a different State than where the action

is pending, or to be brought. Bates v. The Chicago & N. W. R. R. Co., 19 Iowa, 260; Darrance v. Preston, 18 Iowa, 396; Lawrence v. Jarvis, 32 Ill. 30; Freeman on Judgments, §§ 564, 566.

⁴ Woodward v. Willard, 33 Iowa, 542, 549; Mayhew v. Thatcher, 6 Wheat. 129; Lafayette Ins. Co. v. French, 18 How. 404; Freeman on Judgments, § 566.

⁵ Woodward v. Willard, 33 Iowa, 542, 549; Milne v. Van Buskirk, 9 Iowa, 558; Bonsall v. Isett, 14 Iowa, 309; Johnson v. Butler, 2 Iowa, 535; Moore v. Parker, 25 Iowa, 355; Holt v. Alloway, 2 Blackf. 108; Cooper v. Reynolds, 10 Wall. 308; Aldrich v. Kinney, 4 Conn. 308; Smith v. Smith,

are none the less in point, from the fact that the decisions, in many of the cases, were made in the courts of the same State wherein the judgments brought in question were rendered; for under the constitution and laws of the United States, as we have hereinbefore seen, judgments are entitled to the same force and effect in other States as they attain where rendered.

Judgment Satisfied or Reversed. Where a judgment is obtained in a court of a State on a judgment of another State, and is paid by the defendant, and the judgment of the other State is afterwards reversed or set aside, in such case a right accrues to the judgment debtor in the judgment so paid to have refunded the amount so paid, and an action will lie therefor.¹

If the payment be by a third party who is obligated to save the defendant harmless against the same, then the same right accrues to such third party.²

In such cases, of suit for the same, the right of action will be held, on a plea of the statute of limitations, to have accrued at the time of the reversal or vacation of the original judgment, and not at the date of payment of the judgment rendered thereon.³

Judgment Still Pending When a Bar to an Action on the Original Demand. When a valid judgment has been obtained in one State which is unsatisfied, and which the judgment debtor has not attempted to avoid, a suit on the original demand in another State it has been held would be barred if the defendant pleaded the judgment.⁴

Action on Informal Judgment. In actions on judgments of another State wherein technical forms of action are abolished, and where the records of the judgments sued on come duly authenticated according to the acts of Congress, the courts will regard such judgments as of the same force as accorded to them in the State where rendered, regardless of any want of conformity to the uses and forms of the common law.⁵

Conclusiveness of Judgments. Judgments of other States are

17 Ill. 482; *White v. Merritt*, 7 N. Y. 352.

¹ *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107.

² *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107. See, also, *Mann v. Ætna Ins. Co.*, 40 Wis. 549.

³ *Mann v. Ætna Ins. Co.*, 38 Wis. 114; *S. C.*, 40 Wis. 549.

⁴ *Henderson v. Staniford*, 105 Mass. 504.

⁵ *Griffin v. Eaton*, 27 Ill. 379.

conclusive of the matter therein adjudicated as well when on default, if there was service, as in other cases;¹ and pleas merely questioning the right of the original recovery are of no validity to an action on the judgment of another State—nor pleas setting up fraudulent recovery, as affecting the adjudication of the court in rendering the judgment, as that the judgment was obtained by fraud. Such defenses cannot be collaterally sustained, if there was service, so as to fix jurisdiction of the court as to the person of the defendant.²

Effect of Appeals. State Construction Conformed to. In a suit upon a judgment of another State, the court wherein the suit is proceeding will give the same effect to an appeal or writ of error from the judgment sued on, taken therefrom in the State where rendered, as is given by the laws of such State. When such effect is ascertained it is the duty of the court where the judgment is sued on to allow the same result there;³ and the construction put upon the statute or laws of a State by its own courts will be conformed to in construing these laws in the courts of other States, and accordingly enforced when brought in question therein; unless the effect would be to violate the rights of its own citizens, or the settled policy of the State.⁴

Dormant Judgment. Revival of Scire Facias. Though an action will not lie in the courts of one State on a judgment of a court of another State which is *dormant*, yet if the dormant judgment be revived by *scire facias* it is then so reinstated that suit thereon may be maintained, and therefore may be maintained in another State.⁵

If in the State where rendered the time limited for revival by

¹ Kinnier v. Kinnier, 45 N. Y. 535; Norwood v. Cobb, 20 Tex. 588; Cherry v. Speight, 28 Tex. 503; Freeman on Judgments, § 560, *et seq.* But the record of such judgment may be contradicted as to facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity notwithstanding it may recite that they did exist. See Marx v. Fore, 51 Mo. 569; Hoffman v. Hoffman, 46 N. Y., 30; People v. Dawell, 25 Mich. 247.

² Norwood v. Cobb, 20 Tex. 588.

³ Cherry v. Speight, 28 Tex. 503, 518; Shelton v. Marshall, 16 Tex. 344. See, however, where the contrary rule is held. Bank v. Wheeler, 28 Conn. 433; Taylor v. Shew, 39 Cal. 536; Faber v. Hovey, 117 Mass. 107; Merchants' Ins. Co. v. De Wolf, 9 Casey, 45; Freeman on Judgments, § 576.

⁴ Powell v. De Blanc, 23 Tex. 66.

⁵ Morton v. Valentine, 15 La. Ann. 150.

scire facias expire, and proceedings for revival be thereafter instituted and limitation be not pleaded, then judgment of revivor avoids the statute of limitation, and the statute begins to run against the new or revived judgment only from the date thereof.¹ Therefore, it is held that if suit be brought in a different State on the revived judgment, then for defendant to avail himself of the plea of limitation as resting on the statute of the *forum*, the length of time required as a bar by that statute must have run between the day of the rendition of the judgment of revival and the day of the commencement of the suit.² If, on the other hand, the law of the State where suit is brought allows the pleading of the statute of the State where the judgment was rendered as a bar to the action when the time limited therein has fully run, then, although that time may have run as to the original judgment, yet when the judgment sued on has been so revived, then as to the revived judgment the statute of the State where rendered only runs from the revival thereof, and to avail defendant of that statute the full time required in that State must have run between the time of judgment of revival and commencement of the suit thereon.³

Action on Bastardy. Judgment of another State. It is held, in Indiana, that an action of debt will lie on the judgment of an Ohio court in a case of bastardy, adjudging the defendant therein to pay a sum certain in installments, and in default of payment giving execution for the support of the defendant's illegitimate child. The ruling thus is predicated on the fact of the Ohio and Indiana statutes on the subject being alike, this being shown by pleading and proving the statute of Ohio.⁴ This ruling was on demurrer. In the same case the action was defeated, however, on the ground of a failure to show in the declaration any right of the plaintiff to receive the money sued for as *guardian* or otherwise.⁵

Jurisdiction, Inquiry into. But although inquiry may be made into the jurisdiction of the court rendering the judgment sued on in an action on a judgment of a court of another State,

¹ Morton v. Valentine, 15 La. Ann. 150.

² Morton v. Valentine, 15 La. Ann. 150; Orman v. Neville, 14 La. Ann. 393.

³ Morton v. Valentine, 15 La. Ann. 150.

⁴ Stanfield v. Fetters, 7 Blackf. 558.

⁵ Ibid.

where nothing appears either way in the record as to service on or jurisdiction of the person of the defendant, yet this cannot be done in such action on a judgment of a court of general jurisdiction, the record of which, duly authenticated, shows service upon the defendant.¹

Judgments of Justices of the Peace. In some of the United States such judgments have all the force and effect of judgments of courts of record. They are not open to collateral attack and are considered as absolute verity.² Suits upon them, in those States, are, therefore, governed by the same rule as applies to foreign judgments of courts of record. As a general thing, however, justice judgments are not so considered. Being rendered by courts of only local and very limited and prescribed jurisdiction, having no clerk nor seal, they are not governed by the act of Congress which provides for the authentication of judicial records and proceedings. Their effect, therefore, in other States, would seem to be the same as that accorded judgments rendered by foreign countries. They must be shown to have been rendered by courts having jurisdiction over the parties and subject matter, to have been authorized by the laws of the State where rendered. The judgment itself must be proved as a fact like a foreign judgment.³

II. ACTIONS ON DECREES OF OTHER STATES.

Same as on Judgments at Law. Decrees of courts of chancery for the payment of money made with full jurisdiction of the *parties* are of the same dignity and binding force as judgments at law; and actions and suits thereon may be maintained accordingly. Hence an action at law lies in the United States circuit court on a decree for money made by a State court, where the

¹ *Wescott v. Brown*, 13 Ind. 83; *Hall v. Williams*, 6 Pick. 232; *Shumway v. Stillman*, 6 Wend. 447; *Welch v. Sykes*, 3 Gilm. 197; *Lincoln v. Tower*, 2 McL. 473; *Roberts v. Caldwell*, 5 Dana, 512; *Newcomb v. Peck*, 17 Vt. 302; *Westervelt v. Lewis*, 2 McL. 511; *Mills v. Duryee*, 7 Cranch, 481; *Freeman on Judgments*, § 560 *et seq.*, where this subject will be found discussed and many cases thereon cited.

² *Farr v. Ladd*, 37 Vt. 158; *Billings v. Russell*, 23 Penn. St. 191; *Fox v. Hoyt*, 12 Conn. 497; *Turner v. Ireland*, 11 Humph. 447; *Stevens v. Mangum*, 27 Miss. 481.

³ *Carpenter v. Pike*, 30 Vt. 81; *Kean v. Rice*, 12 S. & R. 203; *Danforth v. Thompson*, 34 Iowa, 243; *Greenleaf on Evidence*, § 513.

amount in controversy and the citizenship of the parties thereto are such as to ordinarily confer jurisdiction on the United States circuit court. It follows, as a legal conclusion therefrom, that wherever a judgment at law is conclusive as a record as a cause of action, a decree in chancery is of equal validity for that purpose,¹ and, therefore, actions are maintainable in one State on decrees in chancery of another State, authenticated as by the act of Congress is required.²

Whatever doubts may have formerly existed upon this subject the modern rulings of the courts, both State and National, have set at rest, and in so doing have but conformed to prevailing English doctrines on the subject.³ In the case here cited the Supreme Court of the United States, DANIEL, J., say: "We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained, upon a judgment at law, for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other."⁴ So, that a bill in equity will lie to enforce a decree for money, of the same court or different court, has ever been recognized as a correct principle in courts of equity.⁵ Therefore, not only an action at law will lie in one State, as we have seen, upon a money decree of a court of another State, but it follows that a bill in equity will lie in the court of a State or United States upon a decree of a court, either Federal or State, rendered in another State, provided the citizenship of the parties to the bill (if in the Federal court) be such and the amount in controversy be such as in these respects to confer jurisdiction upon the court.⁶

The case here cited originated in the District court of the United States for the northern district of Iowa, upon a decree of the Circuit court of Grayson county, in the State of Kentucky, by certain of the heirs and distributees of John Golds-

¹ Pennington v. Gibson, 16 How. 65; Nations v. Johnson, 24 How. 195, 203; Evans v. Tatem, 9 S. & R. 252; Warren v. McCarthy, 25 Ill. 95.

² Cases above cited.

³ Pennington v. Gibson, 16 How. 65.

⁴ Ibid.

⁵ Shields v. Thomas, 18 How. 253, 262.

⁶ Ibid.

bury, deceased, for an accounting for the proceeds of said Goldsbury's estate. A decree was made in favor of the complainants in a court of Kentucky, and upon that decree the suit was brought in the United States District court (then exercising circuit court jurisdiction) for the district of Iowa. The court decreed in favor of complainants and the case went thence to the Supreme Court of the United States, which affirmed the decree. It being objected, in said cause, that a bill in equity would lie upon a decree, the court said, DANIEL, J.: "Among the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same or of a different court, as the exigencies of the case or the interests of the parties may require."¹

Decrees, as well as judgments of a final character, of courts of the United States and of courts of the several States, where jurisdiction has fully attached, are binding and conclusive upon parties and privies until satisfied, superseded, set aside or reversed, in all other courts, State and Federal, wherein they come in question in a legitimate course of inquiry, properly verified or authenticated.²

III. ACTIONS IN STATE AND UNITED STATES COURTS ON JUDGMENT OF EITHER.

An action will lie in a State court upon a judgment of a United States court; and so, in a United States court, on a judgment of a State court, the parties being of the proper qualification as to jurisdiction, and the matter in controversy being of the required amount to authorize jurisdiction;³ and in such actions nothing adjudicated in the rendition of the judgment can be readjudicated. If jurisdiction of the person of defendant is attached, the correctness of the recovery is not open to question when the judgment is sued on, for these State and United States courts are not foreign to each other, although their localities or *forums* be in different States.⁴

¹ 18 How. 262.

² Kittredge v. Emerson, 15 N. H. 227.

³ Thomson v. Lee Co., 22 Iowa, 206; Niblet v. Scott, 4 La. Ann. 245;

Barney v. Patterson, 6 Harr. & J. 182; Reed v. Ross, 1 Bald. 38; St. Albans v. Bush, 4 Vt. 58.

⁴ Thomson v. Lee Co., 22 Iowa, 206.

IV. ACTION ON CONDITIONAL AND INTERLOCUTORY JUDGMENTS.

On Conditional Judgment. An interlocutory or conditional judgment will not sustain an action in another State, as where its validity for enforcement by execution depend upon something subsequently to be done; as where a judgment is rendered against a surety in an appeal, under a statute providing therefor, and which statute required that to render such surety liable for the judgment, execution must go against the principal within thirty days, or within a given time, then such statutory regulation not being enforceable in another State, no regard can therein be had to the same, so as to carry out its provisions; and to render a judgment as at common law would be to give to the judgment greater force than it is entitled to where originally rendered; therefore, no judgment can be entered thereon in another State, either statutory or at common law.¹

Judgment on Penal Bonds — Continued. A judgment upon a penal bond for the amount of the penalty, with leave to have execution for a sum named as then due, and the principal judgment to stand as security for other installments of the same debt, as they severally, from time to time, became due, so as then to resume the proceedings and take order of execution therefor, will not maintain or support an action of debt in another State, when from the record it appears that the first and only installment ascertained and adjudicated as due, by the court rendering the judgment, has been paid. The main judgment is but a security; the action is not terminated as to the subsequently occurring liabilities or installments, and the court of a different State cannot take up the proceeding where left off by *scire facias* or otherwise. The real judgment in such a proceeding is for the amount then found to be due, and for nothing more; and that being satisfied, the bond in all other *forums*, except of the State where such judgment is rendered, is not merged in the proceeding, but remains as it was before.² In delivering the opinion in this case, and after reviewing the whole subject with great ability, and in

¹ Kellam v. Toms, 38 Wis. 592. This case was decided on demurrer of defendant, and the proceedings being

very irregular and imperfect, leave was given plaintiff to amend.

² Dimick v. Brooks, 21 Vt. 569; Pierce v. Reed, 2 N. H. 359.

all its aspects, Justice REDFIELD said: "It is in vain to treat this as in any sense a judgment importing an obligation upon which to found an action of debt. It is, at most, an inchoate proceeding — the mere pendency of an action. It is in no sense a more perfect judgment than a default, or judgment upon demurrer, where no damages have been assessed, and where they rest *in pais*, and depend upon proof to be adduced in court. In such case, which is certainly stronger for the plaintiff than the present, it would seem absurd to claim that a court in another State, or, indeed, any other court, could perfect the judgment. We might as well expect that if a defendant leaves one State and goes into another, after the service of process upon him, the court of the latter State will take up the proceedings at that very stage and perfect the judgment."¹ In this same connection the court expressed great doubt if any of the collateral undertakings or obligations growing out of judicial proceedings in one State can be enforced in the courts of another State, the same being in their nature *local* to the *forum* where created or taken, and, as we may here add, subject in a measure to the subsequent rulings of the same *forum* as to their ultimate enforcement, if not as to their final binding effect. As, for instance, as enumerated in the opinion above referred to, proceedings by *scire facias*, or in debt upon recognizances of bail upon *mesne* process; suits against receivers of property, and on replevin bonds and against sheriffs for neglect of duty, and upon prison bonds; and the enforcement of warrants of attorney to confess judgment; and declares it to be clearly the law, that proceedings to enforce any of such collateral liabilities or remedies by *scire facias* must be confined to the court wherein they arose; that the remedies on all such are *local*.² And so of interlocutory judgments. They are not final, and no action can be maintained upon them. To support an action, the judgment must be conclusive.³

V. ACTION ON JOINT JUDGMENT.

A joint judgment, against two or more defendants, rendered without service on or jurisdiction of both, is incapable of being

¹ Dimick v. Brooks, 21 Vt. 580.

² Dimick v. Brooks, 21 Vt. 569, 579, 580. See, also, Pickering v. Fisk, 6 Vt. 102.

³ Thorner v. Batory, 41 Md. 593; Dimick v. Brooks, 21 Vt. 569; Hanover Fire Ins. Co. v. Tomlinson, 6 Thomp. & C. (N. Y.) 127; S. C., 3 Hun. 630

enforced by an action in another State.¹ At least so, if there be no showing that the law of the State where the judgment was rendered tolerated the rendering of such a judgment.² So, on the other hand, a joint judgment of another State against several defendants, when the record states that service was had on each, will not sustain an action against one alone of the defendants therein, there being nothing stated in the petition or declaration as a reason for proceeding against but one;³ but where joint judgment debtors are resident in different States, an action on such judgment may be maintained against each of them separately by averring and showing such residence.⁴

VI. ACTIONS ON A JUDGMENT RENDERED ON A PENAL BOND.

The case of *Battey v. Holbrook* was an action brought in a court of Massachusetts on a judgment of the circuit court of the United States for the district of Rhode Island. The judgment in Rhode island was rendered upon a penal bond, conditioned for the payment of an annual sum for support of a wife, where the parties had separated, which was payable to a trustee as obligee of the bond. Upon breaches to a part of the payments suit was brought, and judgment obtained for the penalty of the bond, as security for both the future and past breaches, with judgment of execution for the amount found due and therein specified for past breaches; the formal judgment for the penalty to stand good for future breaches, and the cause to remain in court, with the right in plaintiff to take orders of execution for the amounts of future breaches which might occur, upon *scire facias* against the defendant, to show cause against the same. The defendant having removed from the jurisdiction of Rhode Island into Massachusetts, was there sued in the State court upon the judgment. The courts of Massachusetts held that judgment could in that State be recovered only upon the effective part of the judgment sued on — only on so much thereof as execution had been awarded for in the United States circuit court where the judgment was rendered; and that the remedy for future breaches was by *scire facias* in the United States court, where the cause was still pending. That

¹ Frothingham v. Barnes, 9 R. I. 474; Mervin v. Kumbel, 23 Wend. 293; Oakley v. Aspinwall, 4 N. Y. 514.

² Knapp v. Abell, 10 Allen, 485.

³ Dart v. Goss, 24 Mich. 266.

⁴ Brown v. Birdsall, 29 Barb. 549.

to allow judgment for the penalty would be to *oust* the court in Rhode Island of its still pending jurisdiction, and also would give to the plaintiff on such new judgment what he could not get by the old — a judgment, without showing a breach, as the whole case could not be transferred into the courts of Massachusetts under any circumstances.¹ Where the liability imposed by a bond is in the nature of a penalty, and such bond is a statutory one, an action for the breach thereof is to recover a penalty, and can only be enforced in the State enacting the statute.²

VII. COMPETENCY OF THE RECORD AS EVIDENCE.

Appellate Judgments. In an action on a judgment of a court of another State, it is no objection to the record thereof as evidence, when duly authenticated, that such record embodies in it the record of a judgment of a justice's court, in the same case, rendering a judgment, from which an appeal was had to the court from whence the record of the judgment comes, and in which appellate court the judgment thus received and sued on was rendered.³

Presumption of Regularity. And where the validity of such judgment, as to form, is dependant on proof of the manner of practice and custom of entering judgments and making up records thereof in the State from which it comes, and nothing appears in an appellate court as to whether there was or was not proof thereof in the court below, the presumption is that such proof was made, and therefore a judgment therein will be sustained when the showing of such proof would have authorized the rendering of the judgment in the court below.⁴

Jurisdiction. In actions on judgments of courts of other States the presumption is, when the record is authenticated as provided by the act of Congress, that the court rendering the judgment in such other State was a court of competent powers,

¹ *Batley v. Holbrook*, 1 Gray, 212; *Dimick v. Brooks*, 21 Vt. 569.

² *Hill v. Frazier*, 22 Penn. St. 320; *Halsey v. McLean*, 12 Allen, 438; *Erickson v. Nesmith*, 4 Allen, 233; *Derrickson v. Smith*, 3 Dutch. 166; *Erickson v. Nesmith*, 46 N. H. 371; *First Nat. Bank of Plymouth v. Price*,

33 Md. 487; *Bird v. Hayden*, 1 Robert. 391.

³ *Clemmer v. Cooper*, 24 Iowa, 185.
⁴ *Clemmer v. Cooper*, 24 Iowa, 185; *Taylor v. Runyan*, 3 Iowa, 474; *S. C.*, 9 Iowa, 522; *Freeman on Judgments*, § 565.

in point of jurisdiction, to the subject matter thereof, to render the same.¹ In *Buffum v. Stimpson* the court say: "There is no validity in the objection, that the court in Wisconsin had not jurisdiction. The record being properly authenticated the presumption is in favor of the jurisdiction."

Admissibility of the Record. Must be Pertinent. To enable a record of another State to be used in evidence in a judicial proceeding it must be authenticated as required by the act of Congress, or else as required by the laws of the State wherein it is sought to be used; and conformity to the latter will do, if not inconsistent with the act of Congress. It cannot require more than is required by the Congressional act.²

But however conformable to either the authentication may be, yet to be allowable in evidence, the record offered must be pertinent to the issue.³

Temporary Judge. In an action on a judgment of another State, in the rendition of which a member of the bar presided as judge under appointment of the regular judge, and during his inability from sickness to act as judge, a statute law of such State allowing such appointment, may be introduced in evidence to prove the authority of the *pro tempore* judge for acting as such.⁴

Assignee as Plaintiff. And when the action on the judgment is in favor of an assignee thereof as plaintiff, and by the law of the *forum* of the pending trial assignees of judgments are allowed to sue thereon in their own name, then an assignment of judgment to plaintiff purporting to have been made of record, and by the clerk certified as part of the record, will be allowed to go in evidence as *prima facie* evidence of plaintiff's right as assignee.⁵

Form of Judgment Not Questionable. Sufficiency as to form of foreign judgment, when sued on in the courts of another State, is not questionable in the court where suit is brought. Every court has its own form and is the judge of the sufficiency.

¹ *Bissell v. Wheelock*, 11 Cush. 277; *Buffum v. Stimpson*, 15 Allen, 591; *Nunn v. Sturges*, 22 Ark. 389; *Halliburton v. Fletcher*, 22 Ark. 453; *Warren v. McCarthy*, 25 Ill. 95; 1 American Leading Cases, 5th ed. 647.

² *Ordway v. Conroe*, 4 Wis. 59; *Hackett v. Bonnell*, 16 Wis. 471.

³ *Ordway v. Conroe*, 4 Wis. 59.

⁴ *Walker v. Leight*, 30 Iowa, 310.

⁵ *Ibid.*

If sufficient where rendered, it is entitled to like faith in other States.¹

Amount Recoverable. But where by the record it appears that part of the judgment sued on has been realized by execution, or otherwise, the recovery thereon can be had for the unsatisfied balance only.²

Execution Levy on Land is No Defense. But the mere levy of execution on land not being in any sense a satisfaction of the writ, it therefore does not effect the judgment which is the foundation of the writ. It results, from these principles, that such levy, or even levy and advertisement of lands for sale, is no defense to an action on a judgment of another State.³

VIII. CHANGE OF STATE SOVEREIGNTY — EFFECT OF ON DECREES.

A decree for a specific performance of a contract to convey real property situated in the State where the decree is made, will be enforced, notwithstanding that the *locus in quo* be, during the pendency of the suit, transferred to, or is annexed to, another State. The court of such other State will execute the same, upon a record of the proceedings being filed therein, duly certified and authenticated.⁴

Organization of New State. So a decree of a court of chancery of the State of Virginia of specific performances, as to lands situated at the time in Kentucky, then a part of Virginia, was held to be enforceable after the separation and organization of Kentucky into a State, in a suit upon such decree, in the circuit court of the United States for the district of Kentucky.⁵

IX. JUDGMENTS AND DECREES IN PROCEEDINGS IN REM.

No Action Sustainable Thereon. Judgments and decrees merely *in rem* of courts of one State will not sustain an action or suit against the defendant therein in the courts of another State.⁶ They bind only the thing or property acted on by them,

¹ Grover v. Grover, 30 Mo. 400; Miles v. Collins, 1 Met. (Ky.) 308.

² Arnold v. Roraback, 8 Allen, 429.

³ Field v. Sanderson, 34 Mo. 542.

⁴ Brown v. Desmond, 100 Mass. 267.

⁵ Caldwell v. Carrington, 9 Pet. 86.

⁶ Melhop v. Doane, 31 Iowa, 397; Price v. Hickok, 39 Vt. 292; Jones v. Spencer, 15 Wis. 583; D'Arcy v. Ketchum, 11 How. 165; Pennoyer v. Neff, 5 Otto, 714.

but so far as their effect concerns that property or thing, as for instance as evidence of right thereto, they are entitled to that full faith and credit everywhere in courts of the other States which are accorded to them in the courts of the State where rendered. If jurisdiction *in rem* properly attach, they are valid, however, as judgments *in rem* and as evidence of what has been effected under them.¹

The levy binds the *res*, and so does the judgment *in rem* that follows, if one be rendered against the *res*, but personal judgment without appearance or service is invalid.²

Are Evidence of Right to Personal Property. Judgments and sales of personal property in proceedings *in rem* against the property sold, obtained and made in one State, and brought in question judicially in another, though of no validity as personal judgments against the defendant therein, and incapable of being the bases of an action or recovery in a different State, when rendered without jurisdiction of the person of the defendant,³ yet condemnation and sales *in rem* of personal property seized on and sold in such proceedings, if valid within the State wherein they occur, are valid within all other States wherein their validity may be brought in question, and are entitled to the same faith and credit when brought in question in such other States as in the State where rendered.⁴ And by a general principle of law, if jurisdiction attached by proper seizure and publication of such notice as may in law be there required where such seizures and sales are made, then the proceedings are there valid until reversed although tinged with irregularities or errors.⁵

¹ Melhop v. Doane, 31 Iowa, 397; Williams v. Armroyd, 7 Cr. 423; Rose v. Kimly, 4 Cr. 240, 269; Croudson v. Leonard, 4 Cr. 433; Grant v. McLachlin, 4 John. 34; King v. Vance, 46 Ind. 246; Penoyer v. Neff, 5 Otto, 714; Green v. Van Buskirk, 7 Wall. 139; Molyneux v. Seymour, 30 Geo. 440; Melhop v. Doane, 31 Iowa, 397.

² Melhop v. Doane, 31 Iowa, 397; Arndt v. Arndt, 15 Ohio, 33; Sevier v. Roddie, 51 Mo. 580; Thompson v. Emmert, 4 McLean, 96; Johnson v. Holley, 27 Mo. 594; McLaurine v.

Monroe, 30 Mo. 402; Rape v. Heaton, 9 Wis. 323; Penoyer v. Neff, 5 Otto, 714. And service must be made within the State, and must be personal, or else a personal judgment, if there be no appearance, is void. Ibid.

³ Jones v. Spencer, 15 Wis. 583; D'Arcy v. Ketchum, 11 How. 165.

⁴ Melhop v. Doane, 31 Iowa, 197; Croudson v. Leonard, 4 Cr. 433; Williams v. Armroyd, 7 Cr. 423; Grant v. McLachlin, 4 John. 34.

⁵ Edmonds v. Montgomery, 1 Iowa, 143.

X. DEFENSES TO SUITS ON JUDGMENTS AND DECREES.

Want of Service. Want of service, if there be no appearance of defendant, renders a personal judgment void for want of jurisdiction of the person, and is a good defense to an action founded on it.

Acknowledgment of Service Invalid. And even if service be acknowledged by defendant, or by him accepted, in writing, in a different State, yet a personal judgment without other means of jurisdiction of the person will be invalid if the written acknowledgment or acceptance be made and delivered in a different State than that in which the judgment is rendered.² The defendant cannot place himself in court by an act done in another State and completed there. Such a proceeding, at most, amounts to no more than an undertaking or consent to appear. It is not like an actual appearance by formal plea to an action which puts the party in court *per se*. And in either case, if the judgment be invalid for want of jurisdiction of the person of the defendant, no action will lie thereon, *in personam*, against the defendant therein if there has been no appearance. For want of jurisdiction of the person of the defendant is a good defense to an action upon a judgment.³

Fraudulent Appearance. So if there be an appearance for the defendant, there being no service, and the appearance be unauthorized and fraudulent, the judgment rendered on such an appearance will not sustain an action.⁴

Officer's Return of Service Contested. If service appears by the officer's return, yet the truth thereof may be contradicted by parol proof.⁵

Insufficient Service Shown by the Record. When, in an action

¹ Scott v. Noble, 72 Penn. St. 115; Miller v. Dungan, 36 N. J. (L.) 21; McVicker v. Beedy, 31 Me. 314; Pennoyer v. Neff, 5 Otto, 714, 730; Thompson v. Whitman, 18 Wall. 457; Lafayette Ins. Co. v. French, 18 How. 404.

² Scott v. Noble, 72 Penn. St. 115, 117; Pennoyer v. Neff, 5 Otto, 714.

³ Marx v. Fore, 51 Mo. 69; McDer-

mott v. Clary, 107 Mass. 501; Wood v. Watkinson, 17 Conn. 500; Davidson v. Sharpe, 6 Ired. 14; Arndt v. Arndt, 15 Ohio, 33; Davis v. Smith, 5 Geo. 274; Warren v. McCarthy, 25 Ill. 95.

⁴ Marx v. Fore, 51 Mo. 69.

⁵ Carleton v. Bickford, 13 Gray, 591; Rankin v. Goddard, 54 Me. 28; S. C. 55 Me. 389.

on a judgment, the record itself relied on as evidence of such judgment shows the service in the action in which the judgment was rendered to have been insufficient to put the defendant in court or subject personally to its jurisdiction, and it is not apparent that the defendant in any manner appeared to the action, then the state of the record, without further proof, will sustain a plea that defendant was not served in and did not appear to the action, and that jurisdiction was, therefore, wanting in the court that rendered the judgment.¹

Proof of other State Law. If the question as to what the general law of another State is, arises in the progress of a trial, it devolves upon the party alleging it and claiming the benefit thereof to make proof of it, and in the absence of such proof the court will, so far as regards the general law, presume it to be the same as the general law of the *forum* where the cause is being tried.² If proof thereof be made as provided by the act of Congress under the constitution, it is all that can be required. Otherwise, that is if not so proven, then proof must be made as required by the law of the *forum* or as between foreign States.³

But although a defendant in a suit on a judgment rendered in a different State may show a want of service or jurisdiction of the defendant's person,⁴ and that he did not appear in the cause in the court where the judgment was rendered, yet to make such showing effectual a foundation therefor must be laid in the pleadings by a special plea, if under common law practice, and if in those States where that system is dispensed with, then by such answer or pleading as by the local rules of practice and pleadings will enable him to introduce the proper evidence to establish such defense. If by the record an appearance by attorney is shown, then such appearance will be deemed to be truthfully shown until the contrary be established by proof, and to make such proof a foundation therefor must be laid as above stated.⁵

Service on a Director. Service upon a mere director in one State wherein the director is found, in a suit against a corporation of another State, does not give jurisdiction of the corpora-

¹ Rape v. Heaton, 9 Wis. 301.

² Ibid.

³ Ibid.

⁴ Knowles v. Gaslight & Coke Co.,

19 Wall. 58; Thompson v. Whitman,

18 Wall. 457; Hill v. Mendenhall, 21

Wall. 453, 454.

⁵ Hill v. Mendenhall, 21 Wall. 453.

tion entity or person, and, therefore, if judgment be rendered against such corporation, in such a proceeding, without appearance or other personal jurisdiction thereof, it is invalid and an action will not lie thereon in a different State from that in which it is rendered.¹

Plea of Recovery on False Testimony no Defense. It is no defense to an action on judgment of another State that it was recovered by means of false testimony. This plea goes only to the right of recovery in the original cause, wherein the judgment was rendered, which cannot be reconsidered collaterally in this way. The defendant at the trial where the judgment was obtained should have overcome the false testimony by other evidence, or else, if taken by surprise or otherwise prevented therefrom without his own fault or laches, should have applied for a new trial. The showing cannot be made in defense when sued in another State on the judgment where jurisdiction of his person existed in the court rendering the judgment.²

Personal Judgment Without Service or Appearance. If a personal judgment be obtained without appearance or service, then the effect as to its invalidity is the same, whether the defendant be a resident or non-resident of the State wherein the judgment is rendered.³

Service on Non-Resident. And so if there be personal service made upon the defendant within the State and proper jurisdiction for service, where the court is held, then it is immaterial whether the defendant be a resident of such State, or is a resident of a different State, and is temporarily present at the time of service in that where served, if the action be such as is maintainable in a different State than that wherein defendant resides; for in actions not in their nature local as growing out of the realty, or as predicated upon local statute of a State, the citizens of the respective States are personally suable therein wherever they may be found.⁴

Error in Rendering the Judgment is No Defense. In suits on judgments of other States, errors of the court rendering the judgment sued on, if the court had jurisdiction, cannot be inquired into or set up against enforcement of the judgment by

¹ *Latimore v. Union Pacific R. R. Co.*, 43 Mo. 105.

² *Cottle v. Cole*, 20 Iowa, 481.

³ *Rape v. Heaton*, 9 Wis. 301.

⁴ *Rape v. Heaton*, 9 Wis. 301; *Barney v. Burnstenbinder*, 64 Barb. 212.

suit. Such matters are receivable only in an appellate court of the State where the judgment was rendered.¹

Jurisdiction Need Not be Averred. Nor need jurisdiction be averred by plaintiff to have been obtained by the court rendering the judgment. If a court of general jurisdiction, that will be presumed, in the absence of any showing to the contrary.² But if suit is on a justice's judgment jurisdiction must be averred.³

When Not Controvertible for Fraud. The ruling in the supreme court of the United States is, that a judgment of the court of one State rendered with full jurisdiction, is not controvertible for fraud when sued on in another State, the defendant in such judgment having appeared to the action in which the judgment was rendered; that a plea that the judgment was obtained by fraud is not a good one.⁴

Such, too, is the ruling in Louisiana, when it appears to have been made matter of defense to the action.⁵ The better ruling, as a general principle, is, that the trial on the merits in the cause wherein the judgment is rendered, *is conclusive* in the courts of other States, if there was jurisdiction in the court rendering the judgment. The courts of other States cannot go behind such judgments and try matters of defense that might have been, or were brought in question in the cause wherein the judgment was rendered;⁶ and if by fraud at the trial the judgment be obtained, proceedings should there be set on foot to vacate it. There are respectable rulings, however, to the contrary.⁷

Only Such Defense as Subject to Where Judgment was Rendered. In a suit in the courts of a State upon a judgment of another State, only such defenses going to the validity of the judgment may be made thereto as would be available against the judgment in a court of the State where the judgment was rendered; for such records and judgment of another State has the same force, and is entitled to the same faith and credit, as in the State

¹ Rogers v. Rogers, 15 B. Mon. 292;
Milne v. Van Buskirk, 9 Iowa, 558.

² Reid v. Boyd, 13 Tex. 241.

³ Grant v. Bledsoe, 20 Tex. 456.

⁴ Christmass v. Russell, 5 Wall. 290.

⁵ Hockaday v. Skeggs, 18 La. Ann.
681.

⁶ Duvall v. Fearson, 18 Md. 502;
Rankin v. Goddard, 54 Maine, 28;
Roberts v. Hodges, 1 C. E. Green, (N.
J.) 299.

⁷ Rogers v. Gwyn, 21 Iowa, 58; Da-
vis v. Headley, 22 N. J. Eq. 115; Ward
v. Quinlivan, 57 Mo. 425.

wherein it is rendered.¹ But where the practice is to plead either legal or equitable defenses to actions at law, or both, then the defendant in an action on a judgment of another State, in a court of the State where such equitable defense is permitted to be made, is not bound to take the remedy of filing and prosecuting a bill in chancery to get rid of liability thereon, but may set it up in the action at law and thus avail himself thereof.² The defense made and thus allowed in the case of *Rogers v. Gwyn* was, that plaintiff promised to dismiss the action, by reason whereof defendant did not appear and defend, and that the plaintiff thereafter took judgment in violation of such promise without the knowledge of defendant. It not appearing from the record that defendant had appeared to the action wherein the judgment was rendered, this defense was allowed. So, too, in an action on a judgment of another State the defendant may show in defense that the attorney who entered his appearance for him had no authority so to do, and if such prove to be the fact, there can be no recovery on the judgment.³

So the defendant may plead a release or payment, or statute of limitations.⁴ Or, any other plea that shows a discharge or satisfaction of the judgment;⁵ but the plea of *nul tiel record* is the only plea on which to test the validity of the record and its authentication.⁶ A plea to an action on a judgment that defendant was not served, and that he had no agent or attorney in the

¹ *Mills v. Duryee*, 7 Cr. 481; *Hampton v. McConnel*, 3 Wheat. 234; *Taylor v. Carpenter*, 2 Woodb. & M. 1; *Westerwelt v. Lewis*, 2 McL. 511; *Warren Manuf. Co. v. Ætna Ins. Co.*, 2 Paine, 502; *Green v. Sarmiento*, Pet. C. C. 74; *S. C.*, 3 Wash. C. C. 17; *Armstrong v. Carson*, 2 Dal. 302; *Field v. Gibbs*, Pet. C. C. 155; *Bryant v. Hunters*, 3 Wash. C. C. 48; *Rogers v. Gwyn*, 21 Iowa, 58.

² *Rogers v. Gwyn*, 21 Iowa, 58; *Harshey v. Blackmarr*, 20 Iowa, 161, 173; *Thompson v. Emmert*, 15 Ill. 415.

³ *Harshey v. Blackmarr*, 20 Iowa, 161, 172; *Hindman v. Mackall*, 3 G. Greene, 170; *Shelton v. Liffin*, 6 How. 164; *Baltzell v. Nosler*, 1 Iowa, 588; *Hall v. Williams*, 6 Pick. 232; *Shum-*

way v. Stillman, 6 Wend. 447; *S. C.*, 4 Cow. 292; *Welch v. Sykes*, 8 Ill. 198; *Alrich v. Kinney*, 4 Conn. 380. In *Harshey v. Blackmarr*, *supra*, the supreme court of Iowa, DILLON, J., say that it is "now settled both in the Federal and State courts" that "a judgment debtor, in an action against him on the judgment of another State, may successfully defend by showing that the attorney who entered an appearance for him had no authority to do so."

⁴ *Jacquette v. Hugunon*, 2 McL. 129; *Sohn v. Waterson*, 1 Dillon, 358.

⁵ *Jacquette v. Hugunon*, 2 McL. 129.

⁶ *Westerwelt v. Lewis*, 2 McL. 511; *Thompson v. Emmert*, 4 McL. 96.

State wherein the judgment was rendered authorized to appear or acknowledge service for him, is not sufficient, if true, to bar a recovery upon a judgment. For aught that is alleged in it the defendant may have voluntarily and in person submitted himself to the jurisdiction of the court. But if the plea had also denied that defendant submitted himself in any manner to the jurisdiction of the court, it would have been good.¹

May Show Want of Jurisdiction. It seems to be a well settled principle of law, that in defense to an action on a judgment of another State, the defendant may show a want of jurisdiction of the subject matter, or of the person of the defendant, in the court rendering the judgment, as also, that there was neither service or appearance in the cause; and this, too, against recitals to the contrary in the transcript of the record sued on.² But the plea of fraud is not admissible, as a general principle, to an action at law upon a judgment of another State; such is the settled ruling of the supreme court of the United States.³

Statute of Limitations. A plea of the statute of limitations of a State to an action in the courts thereof, brought upon a judgment rendered in another State, that the defendant at the time of commencing the action in which the judgment was rendered was a resident of the State wherein suit on the judgment is pending, and that the cause of action on which such judgment was rendered, would have been barred by the laws of the latter State, if the suit had been brought therein, is bad, since such statute of limitations is void for unconstitutionality. Strictly speaking, such statute is not one of limitation merely intended to limit the time in which the remedy is available, but is, if it were valid, a bar to, or denial of, all remedy at any time. Full faith and credit are not only to be given to such record of judgment in the State where sued on, but it is there entitled to have the same effect and force that it had in the State where rendered, so that a statute of limitation of any State depriving it of that effect is unconstitutional and void.⁴

¹ *Struble v. Malone*, 3 Iowa, 586.

² *Pollard v. Baldwin*, 22 Iowa, 328; *Thompson v. Whitman*, 18 Wall. 457. "It is now the prevailing rule that in actions upon judgments of a sister State, want of jurisdiction may be shown in the court by proof contra-

dicting the recitals or adjudications set out in the record." *Lowe v. Lowe*, 40 Iowa, 223; *Galpin v. Page*, 18 Wall. 350; *Arnott v. Webb*, 1 Dillon, 362.

³ *Christmass v. Russell*, 5 Wall. 304; *Maxwell v. Stewart*, 22 Wall. 77.

⁴ *Mills v. Duryee*, 7 Cr. 483; *Christ-*

Personal jurisdiction. Judgment conclusive. When jurisdiction of the person of the defendant attached, in the court wherein the judgment is rendered, the judgment is conclusive, and is not open to any defense or inquiry upon the merits.¹ But in Iowa and some other of the States the plea of fraud is allowed as a defense to an action at law on a judgment of another State.²

Personal jurisdiction obtained by fraud. If jurisdiction be obtained in the courts of one State, by fraud, over the person of a defendant who resides in a different State, that fact may be shown to defeat the action where jurisdiction is thus obtained, and is a good defense thereto; or the defendant therein may disregard the action to which he is thus made a party, and if judgment be rendered against him therein, and he be sued in another State on such judgment, then a showing of such fraudulent manner of obtaining jurisdiction of defendant's person in the original action may be made, and will be a full defense to the action on the judgment in such other State.³ The defendant in the case cited below, of *Dunlap v. Cody*, was a resident of Iowa, and was fraudulently enticed into Illinois for the purpose of there suing him, by falsely pretending that he was wanted there, he being a carpenter, in reference to the building of a pretended elevator of great cost; whereas, in fact, he was only wanted there to obtain jurisdiction of his person in an action, with the advantage thereby of evading the operation of the Iowa statute of limitations, which was an obstacle in the way of recovery in the Iowa courts. The defendant being sued in Iowa, on the Illinois judgment obtained under such circumstances, the Supreme Court held that no recovery could be had thereon. DAY, J., delivering the opinion of the court, characterizes the transaction in the following terms: "An enlightened and just administration of the law, no less than sound public morals, condemns such practices."⁴

Suit against executor or administrator. In a suit against an executor or administrator in a State where he is acting as such, by virtue merely of ancillary letters, and suit is brought by a

mass v. Russell, 5 Wall. 290, 302; Story on the Const. § 1313.

¹ Bank of U. S. v. Merchants' Bank of Baltimore, 7 Gill, 430; Bissell v. Briggs, 9 Mass. 462; Christmass v. Russell, 5 Wall. 290, 302.

² Whetstone v. Whetstone, 31 Iowa, 276.

³ Dunlap v. Cody, 31 Iowa, 260; Ilsley v. Nichols, 12 Pick. 270.

⁴ Dunlap v. Cody, 31 Iowa, 261, 262.

distributee or legatee of the deceased, a plea that the domicile of the deceased was, at the time of his death, in a different State, and that the defendant is executor or administrator, as the case may be, at such place, is a good defense to the action, for distribution is to be made and legacies are to be paid under the administration of the domicile.¹

¹ Probate Court *v.* Matthews, 6 Vt. 269; Selectmen of Boston *v.* Boylston, 2 Mass. 384; Hapgood *v.* Jennison, 2 Vt. 294.

CHAPTER XI.

INTER-STATE PROOF OF RECORDS, JUDICIAL PROCEEDINGS AND LAWS.

- I. NATIONAL PROVISIONS OF LAW ON THE SUBJECT.
- II. PROOF OF RECORDS, AND JUDICIAL PROCEEDINGS IN PURSUANCE THEREOF.
- III. PROOF OF STATUTE LAWS OF STATES UNDER THE ACT OF CONGRESS.
- IV. PROOF OF STATE LAWS AS AT COMMON LAW AND UNDER THE STATUTES OF THE STATES.
- V. PROOF OF PROCEEDINGS OF JUSTICES OF THE PEACE.
- VI. PROOF OF RECORDS OF OFFICE BOOKS.

I. NATIONAL PROVISIONS OF LAW ON THE SUBJECT.

Faith and credit to records. By Section 1 of Article 4 of the Constitution of the United States, it is provided and declared that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and that Congress may, by general law, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. In pursuance of this provision of the Constitution, Congress, on the 26th of May, 1790, passed an act in substance, that the acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto, and that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. And that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken.¹ And by a subsequent act of Congress, of the 27th of

¹ United States Statutes at Large, Vol. 1, 122; R. S. of U. S., 2d Ed. §§ 905, 906.

March, 1804, it is declared that all records and exemplifications of office books which are or may be kept in any public office of any State not appertaining to a court, shall be proved or admitted in any other court or office in any other State by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, secretary of State, the chancellor or the keeper of the great seal of the State, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand or the seal of his office, that said presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the secretary of State, the chancellor, or keeper of the great seal, it shall be under the great seal of the State in which the said certificate is made. And that the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices in the States from whence the same are or shall be taken.¹ And by the last named act, it is also provided that the provisions of both acts shall apply as well to the public acts records, office books, judicial proceedings, courts and offices of the respective Territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several States.²

Applicable only to State courts. The foregoing constitutional and statutory provisions of the United States apply only to the courts of the States and Territories of the United States. They have no reference whatever to the courts, records, documents or acts of the United States, as evidence in the State courts, or to those of the State courts, as evidence in the national courts; in these cases the ordinary certificate of the clerk, and seal of the court, in such manner or form as renders them admissible in

¹ United States Statutes at Large, Vol. 2, 293; R. S. of U. S., 2d Ed. § 906.

² United States Statutes at Large, Vol. 2, 298; R. S. of U. S., 2d Ed. § 906.

the courts of the same State, or in the Federal courts, as the case may be, renders these documents, records and acts mutually admissible as between the State and Federal courts, when otherwise proper evidence.¹ But notwithstanding those national provisions are not intended to apply to the United States courts, yet the records of those courts are admissible in other courts, though certified in accordance with said act of Congress.² The fact that such authentication *more* than fulfills the requirement of the law as to admissibility will not be ground of exclusion.³

State and national courts not foreign to each other. The State and national courts, though emanations of different sovereignties,⁴ are in nowise foreign tribunals to each other, nor are the national courts of one circuit or district such in reference to those of other circuits or districts, but are domestic tribunals, whose seals are recognized as matter of course.⁵ But such courts, both national and State, are courts of different sovereignties, and the national courts are only required to give to judgments of State courts such authority as they are entitled to in the courts of the State wherein they are rendered.⁶

Illustration. Void Judgments. A personal judgment rendered without service on or appearance of defendant therein is void, and will be so regarded when brought in question as a judgment of a State court in the courts of the United States,⁷ notwithstanding the act of Congress of May 26, 1790, and amendatory

¹ *Mason v. Lawrason*, 1 Cr. C. C. 190; *Bennett v. Bennett*, Deady, 299; *Mewster v. Spalding*, 6 McL. 24; *Murry v. Marsh*, 2 Hayw. (N. C.) 290; *Burford v. Hickman*, Hempst. 232; *United States v. Wood*, 2 Wheeler's Criminal Cases, 326; *Turnbull v. Payson*, 5 Otto, 418, 422; *Adams v. Way*, 33 Conn. 419; *Pepoon v. Jenkins*, 2 John. Cases, 119; *Williams v. Wilkes*, 14 Penn. St. 228; *Jenkins v. Kinsley*, 3 John. Cases, 474; *Adams v. Lisher*, 3 Blackf. 241.

² *Craig v. Brown*, Pet. C. C. 352; *Scott v. Blanchard*, 8 Martin, (N. S.) 303; *Johnson v. Rannalls*, 6 Martin, (N. S.) 621; *Balfour v. Chew*, 5 Martin, (N. S.) 517; *Barbour v. Watts*, 2 A. K. Marsh. 290; *Ripple v. Ripple*, 1

Rawle, 386; *Hunt v. Lyle*, 8 Yerg. 142.

³ *Buford v. Hickman*, Hempst. 233.

⁴ *Pennoyer v. Neff*, 5 Otto, 714.

⁵ *Turnbull v. Payson*, 5 Otto, 418, 423, 424; *Womack v. Dearman*, 7 Port. (Ala.) 513; *Commonwealth v. Phillips*, 11 Pick. 28; *Chamberlin v. Ball*, 15 Gray, 352; *Pennoyer v. Neff*, 5 Otto, 714.

⁶ *Pennoyer v. Neff*, 5 Otto, 714.

⁷ *Pennoyer v. Neff*, 5 Otto, 714, 733, 734; *Smith v. McCutcheon*, 38 Mo. 415; *Darrance v. Preston*, 18 Iowa, 396; *Mitchell v. Gray*, 18 Ind. 123; *Hakes v. Shupe*, 27 Iowa, 465; *Borden v. Fitch*, 15 John. 121; *Harris v. Hardeman*, 14 How. 334; *Thompson v. Whitman*, 18 Wall. 457; *Lafayette Ins. Co. v. French*, 18 How. 404.

acts, prescribing the manner of proving records and judicial proceedings of the several States in the tribunals of another of them; these acts do not apply to such judgments as are rendered without jurisdiction of the defendant's person, obtained by service of process within the State, or else by appearance to the action. Such judgments are void.¹

II. PROOF OF RECORDS AND JUDICIAL PROCEEDINGS IN PURSUANCE THEREOF.

Attestation and Seal. Under the act of Congress of May 26, 1790, the records and proceedings of the courts of any State are provable and admissible in any other court within the United States, by the attestation of the clerk and the seal of the court, if there be a seal, thereto annexed, together with the certificate of *the* judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form.² If the records to be certified be those of a court having no seal, then the clerk's certificate must show that fact, or else it must be shown by the certificate of the judge.³

Faith and Credit of Records. Records and judicial proceedings thus authenticated are entitled to such faith and credit in every court in the United States as they have by law or usage in the courts of the State from whence they are taken.⁴

Extended to Territories. By act of Congress of March 27, 1804, the provision aforesaid in reference to authentication and admissibility in evidence of judicial proceedings and records of the courts of the States, and the effect thereof, are extended to courts of all the Territories of the United States.⁵ Though there must have been personal jurisdiction of the defendant to entitle the proceedings to such faith and credit, and though the proceeding be commenced by attachment without service on defendant, yet if he appear and defend, and there then be personal judgment against him, the case comes within the act of

¹ *D'Arcy v. Ketchum*, 11 How. 165.

² 1 Stat. at Large, 122, § 1; 1 Brightley's Dig. of Laws, 265, § 9; R. S. of U. S., 2d Ed. § 905; 1 Greenl. Ev. § 504; 1 Robinson's Pr. 272-276.

³ *Craig v. Brown*, Pet. C. C. 352.

⁴ 1 Stat. at Large, 122, § 1; 1 Brightley's Dig. 265, § 9; 1 Greenl. Ev. § 504.

⁵ 2 Stat. at Large, 298, § 2; R. S. of U. S., 2d Ed. § 906; 1 Greenl. Ev. § 504.

Congress, and the proceedings are entitled to full faith and credit in other States, properly certified.¹

Judge's Certificate. These certificates, when in due form, are proof in themselves. The questions of regularity of the clerk's certificate, and of his being clerk, or if certifying as deputy, then also the questions as to his being deputy, and of the deputy's power to do the act, are all settled in the affirmative by the judge's certificate, if it be in conformity to the act of Congress.² And though the certificate of the judge be not dated, yet if it immediately follows the certificate of the clerk, and the latter be dated, that is sufficient.³ So, letters of guardianship, certified by a probate judge as his own clerk, and by him certified to as judge as being in due form, and stating that he is also clerk, are sufficiently attested under the law.⁴

Proof of Statutes. And so the certificate and seal of State of the genuineness of statute laws need no other proof of their authenticity, or of the official character of the person certifying as secretary of state, and if there be interlineations they are presumed to have been made rightfully;⁵ and so it is settled that State laws need not be proved in the courts of the United States.⁶

Informal Judgment Entries. And where by the State practice no formal entry of judgments of record *in extenso* is made, but mere docket entries are used, as in Pennsylvania and in the District of Columbia, in the State and local courts, then such docket entries and proceedings in the cause, duly certified and authenticated under said acts of Congress, are evidence in the courts of other States and Territories, if a foundation be laid in the pleadings for showing and making proof of such practice and the reason of the non-production of a more formal record.⁷

Personal Jurisdiction Necessary. Though the authentication

¹ *Mayhew v. Thatcher*, 6 Wheat. 129.

² *Young v. Thayer*, 1 G. Greene, 196; *Lewis v. Sutliff*, 2 G. Greene, 186; *Ferguson v. Harwood*, 7 Cranch, 408.

³ *Lewis v. Sutliff*, 2 G. Greene, 186.

⁴ *Roup v. Clark*, 4 G. Greene, 294.

⁵ *U. S. v. The Amedy*, 11 Wheat. 392; 1 Greenl. on Ev. § 480; 1 Robinson's Pr. 252.

⁶ *Owings v. Hull*, 9 Pet. 607; *U. S. v. The Amedy*, 11 Wheat. 392; *Leland v. Wilkinson*, 6 Pet. 317; *Hinde v. Vattier*, 5 Pet. 393.

⁷ *Washington, A. & G. St. Packet Co. v. Sickles*, 24 How. 333; *Ferguson v. Harwood*, 7 Cr. 408; *Philadelphia, Wil. & Balt. R. R. Co. v. Howard*, 13 How. 307; *Hade v. Brotherton*, 3 Cr. C. C. 594.

and formalities be strictly in compliance with the acts of Congress, yet if neither personal service of the original process nor the appearance of the defendant be shown, so as to give the court jurisdiction of the person of the defendant, such record is of no value in another State in evidence against him as the formation for a personal recovery;¹ for to render a record evidence under the acts of Congress in the courts of a different State, it must not only show that the court had personal jurisdiction of the defendant or party against whom it is to be introduced,² but must be authenticated strictly in accordance with said acts of Congress. It must be authenticated according to the form used in the court from whence it comes³ by the *judge*, *chief justice* or *presiding magistrate* of the court, as well as by the clerk, under seal of the court, if there be a seal. A certificate of a person styling himself "*one of the judges*," is insufficient.⁴ And if there be no seal, then that fact should be shown in the certificate of the judge.⁵ If the proceedings be from a surrogate's court, of which the surrogate is both clerk and judge, then the authentication should show that fact, and the surrogate should first certify to his proceedings as clerk and then add thereto his certificate as judge, so as to authenticate the attestation of the clerk as to his being such and as to its being in due form of law so as to bring it within the acts of Congress;⁶ and the proper way is, to use the very language of the act. If there be a seal of the court, then the seal must be affixed to the certificate of the clerk, and it will not be sufficient if only to the certificate of the judge. His certificate needs no seal under the act of Congress.⁷ And if the judge's certificate does not state that the clerk's is in due form, the record is inadmissible.⁸ So, the judge's certificate that the person certifying as such is clerk, and that his signature is genuine, is insufficient; it does not meet the requirements of the act of Congress.⁹

The Acts of Congress Apply only to Courts of Record. This

¹ Buford v. Hickman, Hempst. 232.

² Ibid.

³ Craig v. Brown, Pet. C. C. 352.

⁴ Gardner v. Lindo, 1 Cr. C. C. 78, 94; Stewart v. Gray, Hempst. 94.

⁵ Morgan v. Curtenius, 4 McLean, 366; Talcott v. Delaware Ins. Co., 2 Wash. C. C. 449.

⁶ Catlin v. Underhill, 4 McLean, 199.

⁷ Turner v. Waddington, 3 Wash. C. C. 126.

⁸ Trigg v. Conway, Hempst. 538; Craig v. Brown, Pet. C. C. 352.

⁹ Craig v. Brown, Pet. C. C. 352.

method of proving *inter-State* records, as provided by the act of Congress, has been construed to apply only to the proceedings of courts of record, and is, therefore, inapplicable, in general, to the courts of justices of the peace.¹ But where, as in some of the States, justice's courts are courts of record, it is decided in reference to their records, that they come within the provisions of the act, and may be certified or authenticated in accordance therewith.²

Records of Appellate Court Including Justice's Proceedings. And, notwithstanding the proceedings of justices' courts are not ordinarily held to be within the meaning of the act of Congress, and may not be authenticated under the same with the same claim to faith and credit, as the proceedings of courts of record and general jurisdiction, it is, nevertheless, decided that when by appeal, or other legal process, the written proceedings of justices' courts have gotten into the courts of record and general jurisdiction, and therein are matured into judgment, the proceedings of the latter court including those from the justice's court, are together as an entirety within the provisions of the statute, and may be authenticated as therein provided, and thereupon be entitled to the same faith and credit in the courts of other States as is given to the original proceedings of the ordinary State courts, when so authenticated.³

Courts of Chancery and Probate Courts. Courts of chancery, however, and of probate, are as strictly within the meaning and intention of the act of Congress as are the ordinary courts of common law.⁴

Authentication Conclusive. If the State or Territorial record or document be duly authenticated, as between the State courts, or State and Territorial courts, in accordance with said acts of Congress, then no evidence is admissible to show that the attestation is not *in due form of law*, or to invalidate the legal authenticity thereof.⁵

¹ Snyder v. Wise, 10 Penn. St. 157; Robinson v. Prescott, 4 N. H. 450; Warren v. Flag, 2 Pick. 443; Silver Lake Bank v. Harding, 5 Ham. 545; Mahurin v. Bickford, 6 N. H. 507; Thomas v. Robinson, 3 Wend. 267; 1 Greenl. Ev. §§ 505, 513.

² Starkweather v. Loomis, 2 Vt. 573;

Bissell v. Edwards, 5 Day, 363; Blodget v. Jordan, 6 Vt. 580; Scott v. Cleveland, 3 T. B. Mon. 62.

³ Hade v. Brotherton, 3 Cr. C. C. 594; Clemmer v. Cooper, 24 Iowa, 182.

⁴ Greenleaf on Evidence, § 511.

⁵ Ferguson v. Harwood, 7 Cr. 408;

Records Where New State is Formed Out of Old One. Where a new State is formed out of a part of an old one, and suit is brought in still another State on the transcript of a judgment rendered before such new State was formed, in a county subsequently included in such new State, it is held that a certificate of the clerk of the circuit court of the county certifying that the State was divided and a new State formed of a portion thereof including the county wherein the judgment was rendered; that the court that rendered the judgment was abolished or discontinued, and its records and proceedings transferred to said circuit court of the new State, and that he, as clerk of said circuit court, is the proper and lawful custodian of said records and proceedings of the court wherein the judgment was rendered, such certificate being under the signature of the clerk and seal of said court; and the same being further authenticated by the certificate of the sole judge of said circuit court, stating that the attestation of the clerk is in due form, and the person certifying as clerk is the clerk of said court, the record and authentication thereof were held sufficient to maintain the action.¹

III. PROOF OF STATUTE LAWS OF STATES UNDER THE ACT OF CONGRESS.

Proof of State Statutes. Under the act of Congress of May 26, 1790, the statute laws of the several States are provable and admissible in evidence in the courts of the States respectively, by having the seal of the State annexed thereto.²

When thus authenticated by the seal of State, the presumption is that they were so sealed by the proper keeper of the seal, and therefore no other proof or authentication of the genuineness of such laws is required.³

Statutes Pleaded. Whichever party to a judicial proceeding

Craig v. Brown, Pet. C. C. 354; *Young v. Thayer*, 1 G. Greene, 196. And though the clerk certifies as deputy, no evidence is required to show that a deputy is authorized to do the act, if the judge's certificate follows and is in conformity to the act of Congress. The latter sufficiently proves the legality of the former. *Ibid.* *Hampton v. McConnell*, 3 Wheat. 234:

Mills v. Duryee, 7 Cr. 481; *Mayhew v. Thatcher*, 6 Wheat. 129.

¹ *Darrah v. Watson*, 36 Iowa, 116.

² 1 Stat. at Large 122, § 9; R. S. of U. S. 2d ed. §§ 905, 906.

³ *United States v. Johns*, 4 Dal. 412; *S. C.*, 1 Wash. C. C. 363; *United States v. The Amedy*, 11 Wheat. 392; *Leland v. Wilkinson*, 6 Pet. 317; 1 Greenl. Ev. § 480; 1 *Robinson's Practice*, 252.

relies on a statute law of another State to effect a recovery or a defense, or to establish any facts, must set out and plead such statute as in pleading any fact, and must make proof thereof. A mere averment of the statute and a right claimed under it is not enough; the statute itself must be substantially set out, so that the court, if it is proven, may judge of and decide the effect thereof.¹

State Courts do Not Take Judicial Notice of Other States' Statutes. For the courts of a State cannot take judicial notice of the statute laws of other States. The party claiming the benefit thereof must make proof of them as matters of fact;² and to enable that to be done, they must be pleaded. They must be set out at length and pleaded, so far as relied on, and then proven in the manner prescribed by the act of Congress, or else in such other manner, if any, as is permissible by the laws of the State where such proof is to be made. It will not do, in pleading them, to refer to them merely by their title and date of enactment or approval; they must be set out so as to enable the court to see and know what they are, and to judge for itself of their legal effect.³

The ruling in Ohio is, that their existence is matter of fact for decision of the jury,⁴ but when shown to exist and placed in evidence, their construction is for the court. But, query. If proven by documentary evidence, as by certificate and seal of the Secretary of State, under the act of Congress, in case of statute laws, if their *existence* is not then a question for the court?

Nor Notice of Local Officers. And as State courts of one State do not take judicial notice of the laws of another State,⁵ so they do not of local officers; as, for instance, that there are county

¹ Taylor v. Runyan, 9 Iowa, 522; Bean v. Briggs, 4 Iowa, 464; Pearsall v. Dwight, 2 Mass. 84; Holmes v. Broughton, 10 Wend. 75; 1 Chitty on Plead. 247 *et seq.*; Carey v. Cin. & Chi. R. R. Co., 5 Iowa, 357.

² Carey v. Cin. & Chi. R. R. Co., 5 Iowa, 357; Bean v. Briggs, 4 Iowa, 464; Pearsall v. Dwight, 2 Mass. 84; Holmes v. Broughton, 10 Wend. 75; Walker v. Maxwell, 1 Mass. 104; Collett v. Keith, 2 East, 260; Legg v. Legg,

8 Mass. 99; Hunt v. Hunt, 44 N. Y. 27; 1 Robinson's Practice, 249.

³ Carey v. Cin. & Chi. R. R. Co., 5 Iowa, 357; Bean v. Briggs, 4 Iowa, 464; Pearsall v. Dwight, 2 Mass. 84; Holmes v. Broughton, 10 Wend. 75; Walker v. Maxwell, 1 Mass. 103; Collett v. Keith, 2 East. 260; Legg v. Legg, 8 Mass. 99.

⁴ Ingraham v. Hart, 11 Ohio, 255.

⁵ Fellows v. Pres. & Trust. of Menasha, 11 Wis. 558.

judges, or that they have lawful authority to administer oaths, or exercise particular functions, except as to notaries public, whose acts and seals are everywhere recognized.¹

Ordinarily there must be some evidence of the existence of such officers, and of the official functions and powers of those who hold them. Their authority to act must be authenticated.²

Therefore, where verification of pleadings is required by law, an affidavit, or what purports to be one, without more, to a pleading purporting to have been made in another State before a county judge, with no authentication of his signature or other evidence of his official existence or of its genuineness, such pleading will be treated as an unsworn pleading, and may be so regarded in responding to the same by the adverse party.³

Common Law. And although, in regard to foreign laws, it is a principle, if nothing to the contrary is shown, that the common law of another State is presumed to be the same as the common law of the *forum* where brought in question, yet this *presumption* as to the laws of a State does not exist in regard to its statute laws. There are some cases tending towards such a conclusion, but in the language of RAPALLO, J., in *McCulloch v. Norwood*, "there is no authoritative decision to that effect."⁴ If there were any reason to doubt upon the subject, we may regard this decision, which is so recent as in 1874, and by authority so high and learned, as putting such doubt at rest, and as settling the doctrine against such presumption as regards statute laws. This unwritten or common law of a State may also be proven by the books of reports of cases adjudged in its courts.⁵

IV. PROOF OF STATE LAWS AS AT COMMON LAW AND UNDER STATE STATUTES.

The method of making proof of the laws of the States in the courts of others, prescribed by the act of Congress of 25th of May, 1790, is merely cumulative, and is not inhibitory of such

¹ *Walsh v. Dart*, 12 Wis. 635.

² *Fellows v. Pres. & Trust. of Menasha*, 11 Wis. 558.

³ *Fellows v. Pres. & Trust. of Menasha*, 11 Wis. 558.

⁴ 58 N. Y. 562, 567, modifying the

decision in the same case made in the court below and reported in 4 Jones & Spencer, 180. See, also, *Hull v. Augustine*, 23 Wis. 383; 1 *Robinson's Practice*, 25.

⁵ *Cragin v. Lamkin*, 7 Allen, 395.

other proof within the rules of law, or as may be tolerated as more convenient by any of the States.¹

The proof is to the court. The sufficiency of proof of foreign laws, as also their pertinency to the issue, and their legal interpretation and effect, are all matters for the decision of the court, and not the jury.² But although the proof is to be made to the court, that it may judge of the legal sufficiency of the proof, and of the pertinency and admissibility of the laws so relied upon, yet such laws of other States are to be proven as facts.³

The States may relax, but not increase the requirements of the Act of Congress. Thus where, as in Iowa, a statute exists allowing such proof of statute laws of another State to be made by production of printed copies thereof, purporting to be made and published under authority of such other State, it is held that such proof is admissible as presumptive evidence of the law.⁴ And proof of the *unwritten* laws of another State may be made by the testimony of persons familiar with such laws.⁵ And so it may be proved, as in Iowa, by persons familiar with courts and their practice of other States, that books of statute law produced, are regarded and acted on by the courts of another State as statute laws thereof.⁶ And so may the practice and uses of such courts be proven in like manner by testimony of persons well acquainted therewith.⁷

¹ Laterett v. Cook, 1 Iowa, 1; Raynham v. Canton, 3 Pick. 293; Elmore v. Mills, 1 Hayw. (N. C.) 359; Kean v. Rice, 12 S. & R. 203; Biddis v. James, 6 Binn. 321; Ohio v. Hinchman, 27 Penn. St. 479; Pepoon v. Jenkins, 2 John. Cases, 119; Hackett v. Bonnell, 16 Wis. 496; 1 Greenl. Ev. § 505.

² Moore v. Gwynn, 5 Ired. 187; De Sobry v. De Laistre, 2 Harr. & J. 181; Tyler v. Trabue, 8 B. Mon. 206; Pickard v. Bailey, 26 N. H. 152; Monroe v. Douglass, 5 N. Y. 447; 1 Robinson's Practice, 257.

³ Stephenson v. Bannister, 3 Bibb, 363; Davis v. Curry, 2 Bibb, 233; Ripple v. Ripple, 1 Rawle, 386; Consequa v. Willings, Pet. C. C. 225; Frith v. Sprague, 14 Mass. 435; Cook v. Wilson, Litt. Sel. Cases, 437; Mason

v. Wash, Breese, 16. But though provable as facts, their construction is for the court, as also the fact of their being such, or sufficiency of their proof. De Sobry v. De Laistre 2 Harr. & J. 191; Moore v. Gwynn, 5 Ired. 187; Tyler v. Trabue, 8 B. Mon. 306; Pickard v. Bailey, 26 N. H. 152; Monroe v. Douglass, 5 N. Y. 447.

⁴ Webster v. Russ, 23 Iowa, 269. See, also, to the same effect, Commercial & Farmer's Bank v. Patterson, 2 Cr. C. C. 346; Rockville & Washington Turnpike Road Co. v. Andrews, 2 Cr. C. C. 451.

⁵ Webster v. Russ, 23 Iowa, 269.

⁶ Greason v. Davis, 9 Iowa, 219.

⁷ Webster v. Russ, 23 Iowa, 269; Crafts v. Clark, 38 Iowa, 237.

The States may not require other proof than that provided by Congress. But no State may make a law *requiring* a different method of authentication of such inter-State acts, records, and documents than those provided and contemplated by the provisions of the Constitution above referred to, and the acts of Congress made in pursuance thereof.

Unwritten law provable by books of reports. The unwritten or common law of another State may be proven by the books of reports of cases adjudged in its courts.¹

Private Laws. Private laws of a State are matters of fact, and when offered in evidence in the courts of another State or in a court of the United States, are to be proven as such in the ordinary manner. Official certificates thereof are not available.²

Public Laws. The public laws of a State may be read in evidence in other States by being brought within the requisites of the act of Congress in that respect, and will be taken notice of without such requisites in the Federal courts; but private laws and special proceedings are to be proven as facts.³

Foreign Laws. In the proof of foreign laws, the evidence is to the court and not to the jury, and they must be proved as facts.⁴

Printed volumes. Printed volumes of the statutes purporting to be such are receivable as *prima facie* evidence of the statute laws of another State.⁵ Such volumes, certified to by the secretary of State, under seal of State, as correct copies of the statutes of a State, copied from the original rolls, are admissible as sufficient evidence of genuineness under the act of Congress.⁶

Clerk's Certificate. The form of the clerk's certificate and manner of certifying of a record of a court of one State for use in the courts of another State, is to be in conformity to the laws of the State where the judgment is rendered and where the certificate is made, and the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the same is in due form of law, is conclusive on that subject.⁷ Therefore, it is not

¹ Cragin v. Lamkin, 7 Allen, 395.

² Leland v. Wilkinson, 6 Pet. 317;
¹ Greenl. Ev. §§ 480, 481.

³ Ibid.

⁴ Pickard v. Bailey, 26 N. H. 152;
Story's Conf. of Laws, §§ 638, 638;
¹ Greenl. Ev. § 486.

⁵ Emery v. Berry, 28 N. H. 473;
Dixon v. Thatcher, 14 Ark. 141; 1
Robinson's Practice, 253.

⁶ Wilson v. Lazier, 11 Gratt. 477;
Sisk v. Woodruff, 15 Ill. 15.

⁷ Simons v. Cook, 29 Iowa, 324;
Brown v. Adair, 1 Stew. & Port. 49.

a fatal objection that the clerk's certificate is without a seal, if the judge certifies that it is in due form of law.¹ The act of Congress merely requires the seal, if there be a seal. By the local law of Iowa, the certificate of a judge is sufficient. It need not be that of *the judge chief justice or presiding officer*.²

Presumption as to Laws of other States. In the trial of a cause which involves the common law of another State, the court will, in the absence of proof of what such law is, presume it to be the same as the law of the *forum* where the cause is being tried.³ But this presumption does not extend generally to statute laws, or laws of a penal nature, or embodying strict provisions or forfeitures against usury.⁴

The only presumption affirmatively entertained by courts against the limits of jurisdiction of courts of another State is, that the same is to be restrained within the limits of natural justice.⁵

V. PROOF OF PROCEEDINGS OF JUSTICE OF THE PEACE.

As a general principle it may be taken that the method of evidencing the proceedings of justices' courts among the several States is not within the act of Congress, but was intended to be left as at common law and the statutory regulations of the States themselves; therefore, such evidence should be conformed to the law of the State wherein the proceedings are to be used, when offered in evidence in the court of a different State than that wherein the proceedings were had.⁶

Iowa Statute. In Iowa a State statute admits such proceedings in evidence from another State, when authenticated by the official certificate of the justice of the peace of such other State, certifying the records and proceedings, and supported by the offi-

¹ *Simons v. Cook*, 29 Iowa, 324.

² Revision of Iowa of 1860, § 4058; Code of Iowa of 1873, § 3713; *Laterett v. Cook*, 1 Iowa, 1.

³ *Birdsey v. Butterfield*, 34 Wis. 52; *Ellis v. Maxson*, 19 Mich. 186; 1 *Robinson's Pr.* 250, 251.

⁴ *Hull v. Augustine*, 23 Wis. 383. In *Ellis v. Maxson*, 19 Mich. 186, the court say: "We certainly cannot presume that the Legislature of another

State has adopted all of our statutes, and, therefore, we must have proof before we can know that they have passed any statute." See, also, *Kermott v. Ayer*, 11 Mich. 181; *People v. Lambert*, 5 Mich. 349; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465.

⁵ *Mackay v. Gordon*, 34 N. J. 289.

⁶ *Gay v. Lloyd*, 1 G. Greene, 78; *Railroad Bank v. Evans*, 32 Iowa, 202; 1 *Greenl. Ev.* §§ 505, 513.

cial certificate of the clerk of a court of records of the county of the justice's residence, stating that the justice is an acting justice of the peace of that county and that the signature to his certificate is genuine.¹ Such certificate is also held to be sufficient if made by the successor of the justice who rendered the judgment.² The statement as to the official character of the justice should have reference to the date of his proceedings thus authenticated.

VI. PROOF OF RECORDS OF OFFICE BOOKS.

The records and exemplifications thereof of office books of public offices of the States and Territories, which do not pertain to any court, are provable and admissible in evidence in the several States, in virtue of the act of Congress of March 27, 1804, by attestation of the keeper of such records or books, with seal of his office annexed thereto, if a seal there be, together with a certificate of the presiding justice of the county or district in which the office is kept, or certificate of the governor, or secretary of State, or chancellor, or keeper of the seal of State, that the attestation is in due form and is by the proper officer. But if the certificate be that of a presiding justice, it must also be authenticated by certificate of the clerk or prothonotary of the court, under seal of his office, that such presiding judge is duly commissioned and qualified. And if the certificate is by the governor, secretary of State, chancellor, or keeper of the great seal of State, in such case it must be sealed with said seal.³

¹ Iowa Code of 1873, § 3714; Revision of 1860, § 4059; *Railroad Bank v. Evans*, 32 Iowa, 203.

² *Railroad Bank v. Evans*, 32 Iowa, 203.

³ 2 U. S. Stat. at Large, 298, §§ 1, 2; R. S. of U. S. 2d Ed. § 906.

CHAPTER XII.

PROCEEDINGS BY FOREIGN ATTACHMENT AND GARNISHMENT.

- I. THE ATTACHMENT.
- II. PROCESS OF GARNISHMENT.

I. THE ATTACHMENT.

Proceedings In Rem. Proceedings by writ of attachment against the property of non-resident and absent persons are authorized by law in most, if not all, of the States. Such proceedings being *in rem* are a means of subjecting the property, rights and credits of non-residents and absent debtors, or other non-resident or absent persons, against whom a right of action exists, to the plaintiff's demand. The proceeding is against the property, rights and credits, and not the person, of the defendant debtor, and, therefore, no personal judgment can, ordinarily, be rendered against him.¹

Appearance of Defendant. If, however, the defendant appears in court to the action or proceeding, or is personally served with process within the territorial jurisdiction of the court, then the proceeding becomes also personal, and personal judgment may be rendered against him as in other cases, if a right to judgment be made out;² but this does not prevent judgment of condemnation against the property attached, if proper cause is shown therefor.³ If no property is found and no personal service or appearance, the suit is at an end.⁴

¹ Thompson v. Emmert, 4 McLean, 96; Lincoln v. Tower, 2 McLean, 473; Warren Manf. Co. v. Aetna Ins. Co., 2 Paine, 502; Hendrick v. Brandon, 9 Iowa, 319; Courtney v. Carr, 6 Iowa, 238; Banta v. Wood, 32 Iowa, 469; Penoyer v. Neff, 5 Otto, 714; Drake on Attachment, § 5.

² Toland v. Sprague, 12 Pet. 300; Irvine v. Lowry, 14 Pet. 293; Pollard v. Dwight, 4 Cr. 421; Hendrick v. Brandon, 9 Iowa, 319.

³ Toland v. Sprague, 12 Pet. 300; Cooper v. Smith, 25 Iowa, 269.

⁴ Courtney v. Carr, 6 Iowa, 238.

Attachment Levy. If goods and chattels, rights or credits, be levied on by virtue of the writ of attachment, they are thereby placed within the custody of the law to abide the event of the suit or attachment proceeding, and a lien thereon is created by the levy in favor of the plaintiff for the amount he may recover in the suit.¹ If the levy be on real property, a like lien attaches to the title thereof, and although the right to possession thereof does not, by virtue of the levy, vest in the officer, as in levies on personalty, yet the title to such real estate is thereby placed in legal custody to abide the proceedings in the cause.

Condemnation and Sale. And if condemnation thereof and order of sale be made, the same relates back in effect to the date of the levy, and title passes in case of sale as from the date of levy.²

Only the Property Levied On is Bound, if In Rem. Although in point of practice such proceedings vary in different jurisdictions according to the statutes of the several States, the particulars of which it is not our purpose in this treatise to give, yet one great principle is common to them all, that so far as the proceeding is *in rem* it binds only that property of defendant, which by levy of the process of the court, is placed within the custody of the law and is by subsequent judgment of condemnation and sale ordered by the court to be sold.³

The Sale, if Regular Carries Title. But judgment of condemnation, and sale made thereunder by order of the court, of the property thus placed within its jurisdiction and the custody of the law, carries, if valid, the title and right of property, divesting it out of the defendant and vesting it in the purchaser, by operation of law, and is evidence of ownership and title wherever brought in question, whether within or without the territorial limits of the State;⁴ for, although the proceeding cannot reach the person of the defendant, who has had no day in

¹ *Stiles v. Davis*, 1 Black, 101; *Hacker v. Stevens*, 4 McL. 535; *Kennedy v. Brent*, 6 Cr. 187; *Drake on Attachment*, § 224.

² *Laird v. Dickerson*, 40 Iowa, 665.

³ *Livingston v. Smith*, 5 Pet. 89; *Boyd v. Urquhart*, 1 Sprague, 423; *Westervelt v. Lewis*, 2 McL. 511; *Ricketts v. Henderson*, 2 Cr. C. C. 157;

Lincoln v. Tower, 2 McL. 473; *Warren Manf. Co. v. Ætna Ins. Co.*, 2 Paine, 502; *Miller v. Dungan*, 36 N. J. Law, 21; *Clymore v. Williams*, 77 Ill. 618; *Fitzsimmons v. Marks*, 66 Barb. 333; *Drake on Attachments*, § 5.

⁴ *Moore v. Chicago, R. I. & P. R. R. Co.*, 43 Iowa, 385.

court, it acts upon his title to the property, which, as an attribute thereof, is present in the jurisdiction where is found the property itself, and is in like manner, as is the property, subject to the local law and jurisdiction of the court.

Thus, when proceedings are merely *in rem*, and the property proceeded against is within the State and jurisdiction of the court, and is so levied on or seized by the proper officer as to place the same in custody of the court and the law authorizing such procedure, and in accordance with such law, condemnation and sale is made of the property to satisfy ascertained liability or liabilities, then title thereto passes as against non-resident defendants as owners, although not made parties defendant by any *personal service* of process served within the State, and although no appearance be made in the cause, if such publication or other constructive service of notice be made or given within the State as the laws thereof in such cases require and recognize as sufficient.¹

The Judgment in rem, will Not Sustain an Action Thereon. Although a judgment in such proceeding is not fully satisfied by a sale of the property attached, yet if it is *exclusively in rem* no action can be maintained or judgment in any suit be had thereon for what remains unpaid;² but if brought in question as evidence, although in a different State, it is conclusive to prove what it purports to be, and has the same force and effect as in the State where rendered, if authenticated as the act of Congress in that respect directs.

Personal Judgment Void. No personal judgment will be of any validity in such cases against a defendant to charge him personally within the same State, or elsewhere, or as a basis for process on which other property may be levied and sold.³ Nor will personal service or publication made on the defendant in a different State be of any validity as a basis for such personal judgment, provided defendant does not appear; for State laws have no *extra* territorial force, and no such service or publication made in another State is of any validity whatever, but is simply void.⁴

¹ *Pennoyer v. Neff*, 5 Otto, 714; McL. 262; *Cooper v. Reynolds*, 10 Wall. 308; *Drake on Attachment*, § 5.

² *Warren Manuf. Co. v. Aetna Ins. Co.*, 2 Paine, 502; *Lincoln v. Tower*, 2 McL. 473; *Thompson v. Emmert*, 4 McL. 96; *Boswell v. Dickerson*, 4

McL. 262; *Cooper v. Reynolds*, 10 Wall. 308; *Drake on Attachment*, § 5.
³ *Pennoyer v. Neff*, 5 Otto, 714; *King v. Vance*, 46 Ind. 246; *Drake on Attachment*, § 5.

⁴ *Ibid.*

Thus, in a proceeding by foreign attachment in the courts of a State against the property therein of a citizen of another State, the proceeding being *in rem*, with publication of notice, the levy on the writ of attachment of personal property, though to the amount in value of the claim, or subsequently recovered judgment, does not work a satisfaction thereof. And if the defendant therein personally appears and makes defense, and personal judgment is thereupon rendered against him, such levy is no defense to an action at law on the judgment brought in another State, although it may not appear what disposition was made of the property which was levied on by the attachment in the original action.¹

II. PROCESS OF GARNISHMENT.

Creature of the Statute. Proceedings by garnishment, or trustee process, are proceedings *in rem* in the nature of an attachment, and are most usually resorted to in aid of the more ordinary attachment process. Like the attachment proceeding itself, they are the creature of the statute, only existing where provided for by statutory enactment, and then only to the extent and in the manner there by law allowed.

They are designed to discover and subject the moneys, debts, and property of a debtor which may be in the hands of a third party, or may be owed by him to the debtor, to the process of attachment, in cases where the property may be unknown to the attaching officer as belonging to the debtor, and also, to divest the payment of moneys owing the defendant debtor and apply the same to the payment of the debt or liability due the attaching creditor by a means not within the reach of the usual process of attachment.²

These proceedings come within the scope of our inquiry only so far as regards the proceedings by *foreign attachment*. That is, *First*, where the plaintiff seeks to levy and sell by judicial authority in one State the property therein situated of a citizen or resident of another State, or to seize upon and so apply the rights and credits of such foreign resident or citizen found in the

¹ Maxwell v. Stewart, 22 Wall. 77; S. C., 21 Wall. 71; Drake on Attachment, § 222.

² Drake on Attachment, § 451 et seq.

possession or control, or owing from a citizen or resident of the State wherein the proceeding is prosecuted. *Second*, when by such proceeding it is sought to subject property, credits or liabilities due to such debtor from a non-resident of the State where the proceeding is pending, who is temporarily found within such State and there served with the garnishee or trustee process.

How far this garnishee, or trustee process, may be maintained in the courts of one State against a citizen or resident of another State, found and served with the garnishee process within the State where the proceeding is being prosecuted, is a question upon which the rulings are not uniform; but the better doctrine seems to be that the procedure being *in rem*, and against the property itself, or thing to be subjected, it follows therefrom that such subject matter, and the person garnished as well, must be within the jurisdiction of the court, or else it cannot be reached; hence, an inhabitant of another State is not subject to liability on garnishee process in the courts of a different State than that of his residence, on account of property or interests in his possession in such other State, none of which is within the State where he is garnished; nor for debts or liabilities payable in such other State. For, unless the property is within the jurisdiction of the court, the garnishee cannot be made liable, for he is only liable to the court as he is to his creditor, or to the owner of the property, and if not bound to deliver or to pay to the one, he is not liable to respond to the other by so delivering or paying in a different State than where his duty to his creditor, or the owner of the property, requires him to pay or deliver; his contract and liability cannot be enlarged or changed by the court; and if he discovers by his answer property which is in his control in a different jurisdiction, the court is powerless to reach it on the one hand, and he is not bound to bring it within the jurisdiction on the other, and cannot be compelled so to do; nor can he be rendered liable to a money judgment instead, for he owes no money, and his liability cannot be changed.¹ The principle

¹ *Baxter v. Vincent*, 6 Vt. 614; *Kidder v. Packard*, 13 Mass. 81; *Ray v. Underwood*, 3 Pick. 302; Ill. Cent. R. R. Co. v. *Cobb*, 48 Ill. 402; *Jones v. Winchester*, 6 N. H. 497; *Hart v. Anthony*, 15 Pick. 445; *Nye v. Lis-*

combe, 21 Pick. 263; *Sawyer v. Thompson*, 24 N. H. 510; *Tingley v. Bateman*, 10 Mass. 343; *Bates v. New Orleans, Jack. & G. W. R. R. Co.*, 4 Abbott, Pr. 72; *Gold v. Housatonic R. R. Co.*, 1 Gray, 424; *Danforth v.*

applies alike to natural persons and corporate bodies non-resident of the State wherein they are garnished.¹ Nor is the rule altered by the fact that the personal residence of the foreign corporation is *within* the jurisdiction;² or that the books of the corporation are kept therein.³ Or that the corporation garnished is in possession of and is operating a railroad as lessee *within* the jurisdiction; it is nevertheless a foreign corporation, and cannot be compelled to bring its means, or property held by it, within the jurisdiction, or to pay there if the liability to pay is to pay at a place in another State.⁴

If, however, the corporation be chartered by two or more States, then it is domestic in each, and may be garnished in either.

And where in such proceeding of foreign attachment the process of garnishment is resorted to by the plaintiff, by which a debtor of the defendant is garnished and is subjected to a judgment in favor of the plaintiff for the debt, jurisdiction *in rem* of the subject matter thereof having legally attached in the court, then the judgment *in rem* condemning the debt and ordering its payment to the plaintiff is conclusive and cannot be collaterally attacked in the same or in a different State, and is a good defense to an action brought thereafter by the original creditor upon the original debt or cause of action.⁵

In some States the statutes provide for personal service, at the option of plaintiff, upon the defendant in another State in *lieu* of the customary *publication* in cases of foreign attachment, and others where the proceeding is *in rem*. It is not claimed that by virtue thereof any personal jurisdiction is obtained over the defendant, but it is held that such personal service in another

Penny, 3 Met. 564; Balt. & Ohio R. R. Co. v. Gallahue, 12 Gratt. 655; Miller v. Hooe, 2 Cr. C. C. 622; Drake on Attachment, § 474.

¹ Danforth v. Penny, 3 Met. 564; Gold v. Housatonic R. R. Co., 1 Gray, 424; Balt. & O. R. R. Co. v. Gallahue, 12 Gratt. 655; Smith v. Boston, C. & M. R. R. Co., 33 N. H. 337; Larkin v. Wilson, 106 Mass. 120; Drake on Attachment, § 478.

² Gold v. Housatonic R. R. Co., 1 Gray, 224; Danforth v. Penny, 3 Met.

564; Balt. & Ohio R. R. Co. v. Gallahue, 12 Gratt. 655.

³ Gold v. Housatonic R. R. Co., 1 Gray, 424; Danforth v. Penny, 3 Met. 564; Balt. & Ohio R. R. Co. v. Gallahue, 12 Gratt. 655; Smith v. Boston, C. & M. R. R. Co., 33 N. H. 337.

⁴ Balt. & Ohio R. R. Co. v. Gallahue, 12 Gratt. 655; Smith v. Boston, C. & M. R. R. Co., 33 N. H. 337.

⁵ Moore v. C., R. I. & P. R. R. Co., 43 Iowa, 385; Balt. & Ohio R. R. Co. v. May, 25 Ohio, St. 347.

State obviates the necessity of publication, and substantially effects the same purpose.¹ Now, however ample the power of the legislature may be to reach through the courts, the control of property situated within the State, and to give validity to the acts done in view thereof, as, for instance, notice of publication, published within the State, yet it may be a matter of serious doubt as to their power to give effect to acts, as service, for instance, on a defendant, done and performed *outside* the State and within the limits of another sovereignty. If such service in another State is void, then the proceedings resting thereon are void on the same principle that they are void when resting on a void order of publication; and it is held that the making of an order of publication against a non-resident defendant is a judicial act, and cannot be done by a commissioner or other officer who is interested in the case as the attorney of the defendant; that the officer granting such order must deliberate, decide, adjudge as to the propriety of it, and that therefore an attorney in the cause is utterly disqualified from performing these judicial functions in any manner pertaining to such suit;² so that when an order or decree is made in a cause against a defendant who has not appeared therein, and without any other service than an order of publication made under such circumstances, it stands or falls with the order of publication, and these being a nullity, as they are when thus made, the decree is void.³ Such exceptionable proceedings should be removed from the records or files of the cause.⁴ Nor will garnishee proceedings lie against an inhabitant of a State, where instituted to reach means in his hands, which he holds as assignee of an insolvent debtor of another State; the effect would be to defeat the assignment *pro tanto* if allowed, and to give the plaintiff an undue priority in the assets.⁵ In a proceeding *in rem* by foreign attachment and garnishee, jurisdiction *in rem* attaches by service of the garnishee process. The supposed indebtedness of the garnishee, or interest of the debtor in his hands, is thereby placed in the custody of the law, and jurisdiction over the subject matter thereof is vested in the

¹ Miller v. Davison, 31 Iowa, 435; Bates v. The C. & N. W. R. R. Co., 19 Iowa, 260. See, also, as bearing on this principle, Grant v. King, 31 Mo. 312; McComber v. Jaffray, 4 Gray, 82.

² Crouch v. Crouch, 30 Wis. 667.

³ Ibid.

⁴ Ibid.; Hurd v. Jarvis, 1 Pinney, 475.

⁵ Wales v. Alden, 22 Pick. 245.

court, to inquire into the liability or indebtedness of the garnishee; and the liability of the real defendant to the plaintiff on the alleged cause of action may be adjudicated before judgment as to the garnishee, and if judgment goes in favor of the plaintiff, the amount realized or reached by the garnishee process is applied thereon, or so much of it as will satisfy the principal liability and costs;¹ but if nothing be found against the garnishee, or in his hands, jurisdiction is at an end, and the whole proceeding terminates.

¹ *Keep v. Sanderson*, 12 Wis. 353

CHAPTER XIII.

INTER-STATE INSOLVENT DISCHARGE BY STATE COURT.

- I. THE COURT MUST HAVE JURISDICTION OF THE CREDITOR'S PERSON.
 II. DISTRIBUTION OF INSOLVENT ASSETS.

I. THE COURT MUST HAVE JURISDICTION OF THE CREDITOR'S PERSON.

In proceedings of a debtor to obtain a discharge under a State insolvent law, it is the *citizenship* of the parties that governs and enables the court to have jurisdiction, and not the *place* where the contract is payable, or where it is to be performed; therefore, a discharge in such a proceeding has no force against a creditor who is a citizen and resident of a different State at the time the proceeding is had, and who has not appeared therein, or in some manner made himself a party thereto, or consented to the discharge. Such is now the settled doctrine of the courts.¹ Jurisdiction of the person of the creditor is necessary, by actual

¹ Hawley v. Hunt, 27 Iowa, 303, 307, 308; Baldwin v. Hale, 1 Wall. 223; Ogden v. Saunders, 12 Wheat. 213; Boyle v. Zacharie, 6 Pet. 348; Suydam v. Broadnax, 14 Pet. 75; Cook v. Mof-fat, 5 How. 295, 310; Donnelly v. Corbett, 7 N. Y. 500; Felch v. Bugbee, 48 Maine, 9; Poe v. Duck, 5 Md. 1; Beers v. Rhea, 5 Tex. 349; Anderson v. Wheeler, 25 Conn. 603; Pugh v. Bussel, 2 Blackf. 394; Crow v. Coons, 27 Mo. 512; Beer v. Hooper, 32 Miss. 246; Woodhull v. Wagner, Bald. C. C. 296, 300; Springer v. Foster, 2 Story C. C. 382; Kelley v. Drury, 9 Allen, 27. Anything to the contrary hereof, going to make an exception as to cases where the contract is performable in the same State of the insolv-

ency tribunal, as held in Scribner v. Fisher, 2 Gray, 43, is to be disregarded, as that case was overruled in this respect by the United States Supreme Court in Baldwin v. Hale, *supra*; and so, again, by the Supreme Court of Massachusetts, in Kelley v. Drury, *supra*; Collins v. Rodolph, 3 G. Greene, 299; McKim v. Willis, 1 Allen, 512; Gilman v. Lockwood, 4 Wall. 409; Riley v. Lamar, 2 Cr. 344; McMillan v. McNeill, 4 Wheat. 209; Woodbridge v. Allen, 12 Met. 470; Proctor v. Moore, 1 Mass. 198; Smith v. Smith, 2 John. 235; Watson v. Bourne, 10 Mass. 337; Soule v. Chase, 39 N. Y. 342. See, also, note to Baldwin v. Hale, 3 Am. Law Reg. (n. s.) 462; Bishop on Insolvent Debtors, 64.

notice or service, as in personal actions, and can no more be given in one than in the other of those proceedings, where the party to be affected resides out of, and is not found within the State, and does not in some manner submit himself to the jurisdiction.¹ In *Ogden v. Saunders*, the Supreme Court of the United States, JOHNSON, Justice, say: "That, as between citizens of the same State, a discharge of a bankrupt by the laws of that State is valid, as it affects posterior contracts; *as against citizens* of other States it is *invalid* as to *all contracts*."² And in *Cook v. Moffat*,³ the same court say: "A certificate of discharge under an insolvent law will not bar an action brought by a citizen of another State on a contract made with him;" and that State insolvent laws "can have no effect on contracts made before their enactment, *or beyond their jurisdiction*." Nor can such laws and proceedings act upon the *debts* in the nature of proceeding *in rem*, by reason of the *debtor* being within the jurisdiction; for it is a settled principle of the law, that a debt attends the *person* of the *creditor*, and not of the debtor, no matter where the debtor may be, or in what State the debt originated, or is made payable.⁴ So that if the debt attends the creditor, and the creditor is a non-resident of the State, it cannot at the same time be within the jurisdiction of the court where the proceedings are had, so as to be acted on *in rem*. The same doctrine is asserted in *Felch v. Bugbee*, *infra*. It is the *citizenship*, and not the locality or jurisdiction, which is designated as the place of payment, that the legal rights of the parties rest on, as to a discharge under the insolvent laws. In the case here cited, the notes were made in Boston, Massachusetts, payable to the maker's own order, and were assigned by him to citizens of Massachusetts, who, at Boston, negotiated and sold them to the plaintiff before maturity, and before the proceedings in insolvency were instituted. One of the notes was payable in Boston. The other did not name any place of payment. The court held, or reasserted

¹ *Hawley v. Hunt*, 27 Iowa, 303, 307, 308; *D'Arcy v. Ketchum*, 11 How. 165, and cases cited above.

² 12 Wheat. 233. And although there was a divided court in this case, yet by subsequent concurrence of all the judges in a parallel case, the doc-

trine of the case of *Ogden v. Saunders* is no longer open to controversy. *Boyle v. Zacharie*, 6 Pet. 348, and *Same v. Same*, 6 Pet. 635.

³ 5 How. 309.

⁴ *Hawley v. Hunt*, 27 Iowa, 303, 307.

the principle of law, that as between its own citizens, a State had power to grant a full discharge;¹ and that a subsequent change of domicile or citizenship into another State, made after entering into the contract or creating the liability, did not in law affect the validity of a discharge obtained before such change or removal.² But that where the liability is a negotiable one, payable generally, and is between citizens of the State granting the discharge, and endorsed to a citizen of another State before maturity, and before the inception of proceedings in insolvency, the endorsement is a new contract, and the discharge will not bar an action thereon.³ And such is the rule of law in both the State and United States courts.⁴ And so of a note made payable in one State wherein it is executed and the maker resides, but if it is made payable to a citizen or resident of another State, after a full review of the rulings on the subject it can be received, as well settled, that an insolvent discharge, under the law of the State wherein the debtor resides and the note is payable, will not bar an action on the note in favor of such non-resident payee, who has not subjected himself to the jurisdiction of the court granting the discharge in insolvency.⁵

In the case of *Baldwin v. Hale*,⁶ the action was on a promissory note, made at Boston, in the State of Massachusetts, and endorsed by the maker, in whose own favor it was made, to the plaintiff in the action, who was then, and until the time of suit upon the note, a citizen and resident of the State of Vermont. The note was payable at Boston six months after its date. Soon after making and thus endorsing the note to Hale, Baldwin applied for and obtained the benefit of the insolvent law of Massachusetts, in a court of that State, and received his discharge in

¹ Felch v. Bugbee, 48 Maine, 9, 11; Stone v. Tibbetts, 26 Maine, 110; Ogden v. Saunders, 12 Wheat. 213.

² Felch v. Bugbee, 48 Maine, 9, 11; Stevens v. Norris, 30 N. H. 466; Brigham v. Henderson, 1 Cush. 430.

³ Felch v. Bugbee, 48 Maine, 9, 12; Banchor v. Fisk, 33 Maine, 316; Houghton v. Maynard, 5 Gray, 552; Savoye v. Marsh, 10 Met. 595; Anderson v. Wheeler, 25 Conn. 603.

⁴ Cook v. Moffat, 5 How. 309.

⁵ Felch v. Bugbee, 48 Maine, 9, 13, 15; Cook v. Moffat, 5 How. 309; Ogden v. Saunders, 12 Wheat. 213; Donnelly v. Corbett, 7 N. Y. 500; Anderson v. Wheeler, 25 Conn. 603; Woodhull v. Davis, Bald. C. C. 300; Towne v. Smith, 1 Wood & M. 115, 137.

⁶ 1 Wall. 223.

terms purporting to be from all contracts payable or to be performed in that State. Hale neither became a party to the proceedings nor made any appearance thereto, he being at the time in Vermont; neither did he prove up his claim upon the note. Hale then sued Baldwin on the note in the Circuit Court of the United States for the District of Massachusetts, and the defense principally relied on was that the note was *payable in Massachusetts*, and therefore came within the terms of the discharge, but the court held that the discharge did not extend to a debt held, as that was, by one who, at the time of the proceedings, was resident in another State, and was in no manner a party thereto, and that such was the law irrespective of the fact that payment was to be made within the State of Massachusetts, where the insolvent proceedings were had. The case having gone to the Supreme Court of the United States upon a writ of error, that court affirmed the decision of the circuit court.¹ In delivering the opinion, CLIFFORD, J., said: "Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction in the case."²

In Louisiana there must be personal notice, to the creditor, of the proceeding in insolvency, or else their claims will not be barred by the supposed discharge. If the creditors are resident, actual notice must be served on them. If they are non-resident, then notice must be mailed to them by a notary. Also, public notice thereof by publication. Without these the debtor is not discharged by proceedings under the laws of insolvency.³

But, query? As to the jurisdiction of the State to effect a discharge as against a non-resident creditor, who does not make himself a party to the proceedings, or is not made so by actual personal service, effected within the State, even if these preliminary requirements of the Louisiana law be complied with, as to

¹ Baldwin v. Hale, 1 Wall. 223; to same effect see Anderson v. Wheeler, 25 Conn. 605; Donnelly v. Corbett, 7 N. Y. 500; Poe v. Duck, 5 Md. 1; Woodhull v. Wagner, Bald. C. C.

300; Felch v. Bugbee, 48 Maine, 9; Towne v. Smith, 1 Wood. & M. 115.

² 1 Wall. 234.

³ Breedlove v. Nicolet, 7 Pet. 413

publication and the mailing of notice, for we have seen¹ that it is the citizenship and personal jurisdiction of the parties to be affected that gives the court power to discharge, and that such proceeding has no validity as against a creditor, or his debt, who is resident or citizen, at the time, of another State, and is not an actual party to the proceedings, by his own consent, or by personal service made within the State. The laws of the *forum* can have no force or effect beyond the confines of the State.

Suretyship and Indemnity. Contracts of suretyship and of indemnity against the same, entered into in one State to release the property of a non-resident held under judicial proceedings in the State where such contracts are made, are governed by the law of the State where made, and performance is there contemplated, if no other place of performance be mentioned, although the owner of the property resides in a different State.²

Such being the rule of the contract, a discharge of such owner under insolvent proceedings in the State where he so resides, will not relieve him from liability on his contract of indemnity in the State where the same was made, as against those same sureties there resident, in whose behalf the indemnity contract was made.³

II. DISTRIBUTION OF INSOLVENT ASSETS.

National Priority. In the distribution of proceeds of sales, in cases of insolvent debtors, the United States have priority of all other creditors, and are entitled, except as against prior and valid liens, to be first paid.⁴

The fact that this priority is conferred by statute renders it unnecessary to enquire how far such preference exists upon general principles. It was first conferred by act of Congress of March 3, 1797, and by the collection laws of the United States, and is construed to apply only to cases of legal insolvency, as assignments by insolvent debtors, or to persons declared bankrupts.⁵ This priority is, also, applicable only to government debts accruing after the passage of the act of Congress.⁶ It is

¹ *Ante*, note 1 to this chapter.

² *Boyle v. Zacharie*, 6 Pet. 635.

³ *Ibid.*

⁴ *U. S. v. Fisher*, 2 Cr. 358; *Harrison v. Sterry*, 5 Cr. 289.

⁵ *Prince v. Bartlett*, 8 Cr. 431, 433, 434; *U. S. v. Howland*, 4 Wheat. 105; *Thelusson v. Smith*, 2 Wheat. 396.

⁶ *U. S. v. Bryan*, 9 Cr. 374.

not such an insolvency, however, as is indicated by a mere inability to pay debts that will give rise to such a preference; but there must be an assignment, or proceeding in bankruptcy. But if such a case arises as gives vitality to the priority, then such priority overrides all other claims to payment, including judgment liens;¹ for the judgment creditor takes his lien subject to this very condition of things, if occasion gives rise to them. In the case of *Thelusson v. Smith*, the Supreme Court of the United States, WASHINGTON, J., say, that such priority excludes "all debts due to individuals, whatever may be their dignity."²

Limit of National Priority. But this first satisfaction must be out of the debtor's estate; and, therefore, if the debtor sell and convey all his property, *bona fide*, before the right of priority is brought into action or effect, or before that time he makes a mortgage thereof to secure a debt, or the property be levied and seized under a writ of *feri facias*, if personal property, so that the property is divested out of the debtor, then the right of priority in the United States cannot arise as to such property, by reason of any subsequent act of assignment or bankruptcy; for the property is no longer in the debtor. Judgments give liens preference over other ordinary debts, on the lands of a debtor, but the act of Congress defeats this preference in favor of the United States.³

Subrogation of Sureties Paying National Priorities. A surety of such debtor, who pays the debt to the United States, which is thus entitled to priority, has a right to be subrogated to the same priority of payment which previously inured to the government, for the reimbursement to him of the sum thus paid.⁴ In the case here cited, of *Hunter v. The United States*, this principle is asserted in the following language: "The same right of priority which belongs to the government attaches to the claims of an individual who, as surety, has paid money to the government."⁵

National Debts Not Matured. The priority of the United States, above referred to, applies to liabilities, although payable after proceedings had, if contracted prior thereto.⁶

¹ *Thelusson v. Smith*, 2 Wheat. 396.

² 2 Wheat. 425.

³ *Thelusson v. Smith*, 2 Wheat. 396, 426; 1 Stat. at Large, 676, § 65, Act of Cong. of 1799; R. S. of U. S., 1874, § 3466.

⁴ *Hunter v. U. S.*, 5 Pet. 173, 182, 183.

⁵ 5 Pet. 182, 183.

⁶ *U. S. v. Bank of North Carolina*, 6 Pet. 29.

Foreign Assignments. It is the prevailing doctrine of the American courts that an assignment voluntary, by a debtor, or by commissioners or officers of the law, of a debtor's personal property under a foreign bankrupt or insolvent law, will not operate as a legal transfer of that part of the property which is within another State or country, as *against* a creditor of the bankrupt or insolvent, who resides where such property is situated, and who interposes or asserts his claim against such property by attachment or other proper legal proceedings. The claims of assignees or commissioners cannot, in such cases, prevail as against creditors and property situated in another State.¹

The Rule in Maryland. Yet the ruling in Maryland is that all the effects of an insolvent, wherever situated, whether in the State or out of the State, are, by the assignment, vested in the trustee; and that, without regard to what the courts of other States may hold in regard to it; and, although the courts of Maryland cannot reach it if in another State, yet, if brought within the jurisdiction of the Maryland court, it will be regarded and treated as a part of the trust fund, and the trustee will be entitled to it.²

That the trust fund will be administered in the Maryland courts according to Maryland law, and that when the doctrine of *comity* and such domestic law conflict, the positive local law will control.³

The effect of assignments, made in one State, of property situated in another State, for the benefit of creditors, has given rise to much and varied discussion, and the courts, it will be seen, are not at all a unity upon the question. Where the assignment contravenes a law or custom of the State where the property is situated, it can be safely stated that it will give way to the *lex rei sitæ*.⁴ But, where the assignment under an insolvent law does not conflict with the law of the State where the property is

¹ Felch v. Bugbee, 48 Maine, 9, 19; Blake v. Williams, 6 Pick. 286; The Watchman, 1 Ware, 232; Towrie v. Smith, 1 Woodb. & M. 137; Wharton's Conf. of Laws, § 392; Story's Conf. of Laws, § 410 *et seq.*; 2 Kent, *405; Harrison v. Sterry, 5 Cr. 289; Ogden v. Saunders, 12 Wheat. 213; Ples-toro v. Abraham, 1 Paige, 236; Holmes

v. Remsen, 20 John. 229; Osborn v. Adams, 18 Pick. 245.

² Gardner v. Lewis, 7 Gill, 377.

³ Ibid.

⁴ 2 Kent. *407; Green v. Van Buskirk, 5 Wall. 307; Burrill on Assignments, § 306 *et seq.*; Bishop on Assignments, § 261.

situated, and the rights of resident creditors do not intervene, the foreign assignment will be respected out of considerations of comity.¹ Where the rights of creditors resident in the State have intervened, as by attachment, they will be entitled to priority as against the foreign assignee.²

Real estate situated in another State can only be covered by a foreign assignment when it conforms to the *lex loci rei sitæ*.³ The remedies, and methods of enforcing them under foreign insolvent assignments, are governed by the *lex fori*.⁴

¹ 2 Kent. *407; *Green v. Van Buskirk*, 5 Wall. 307; *Burrill on Assignments*, § 306 *et seq.*; *Bishop on Assignments*, § 261.

² See the subject of foreign assignments discussed *supra*.

³ *Osborn v. Adams*, 18 Pick. 245; *Dundas v. Bowler*, 8 McLean, 399; *Houston v. Nowland*, 7 Gill & J. 480.

⁴ *Speed v. May*, 17 Penn. St. 95; *Jones v. Taylor*, 30 Vt. 48.

CHAPTER XIV.

ACTIONS FOR TORTS AND TRANSITORY ACTIONS.

- I. ACTIONS OF TRESPASS VI ET ARMIS.
- II. ACTIONS OF TRESPASS ON THE CASE FOR TORTS AND TRANSITORY ACTIONS.
- III. ABATEMENT AND BAR OF ACTIONS.

I. ACTIONS OF TRESPASS VI ET ARMIS.

Trespass Quare Clausum Fregit is Local. Prominent among actions of trespass *vi et armis*, in England, is the action of trespass *quare clausum fregit*, or action of trespass for breaking and entering plaintiff's close. This is a common law action, and being for injury to the realty and to the possession of the owner thereof, it is a local action, and does not lie outside of the State or sovereignty wherein the premises are situated and the trespass occurs.¹ The injury being thus local, *inter-State* actions will not lie therefor. That is to say, an action will not lie for such cause in a different State, or different district of the United States, than the one wherein the injury is committed. That, if the wrong-doer retires to a different State before suit against him, he cannot be sued therein for the injury. Where the wrongful act is committed in one State, by which real property situated in another State is injured, the question arises whether there is not a cause of action in either State. It has been held in one case that suit could be brought in either.²

¹ McKenna v. Fiske, 1 How. 241, 248, 249; Livingston v. Jefferson, 1 Brock. 203; Gorman v. Marsteller, 2 Cr. C. C. 311; Smith v. Bull, 17 Wend. 323; Watts v. Kinney, 23 Wend. 484; Champion v. Doughty, 18 N. J. Law, 3; Doulson v. Matthews, 4 T. R. 503; Ham v. Rogers, 6 Blackf. 539.

² Rundle v. Del. & Rar. Canal, 1

Wall. 275. See, also, Worster v. Win-nipiseogee Lake Co., 25 N. H. 525, where most of the authorities are collected, and the court holds that the action is local and can be brought only where the land is situated. See further, Barden v. Crocker, 10 Pick. 383, and Angell on Water Courses, § 420, 7th ed.

II. ACTIONS OF TRESPASS ON THE CASE FOR TORTS AND TRANSITORY ACTIONS.

Transitory Actions will Lie in Other States. But actions of trespass *vi et armis* for *personal injuries*, and trespass *de bonis asportatis*, and other personal torts, are, in this respect, very different. In these cases the actions are personal and transitory: The right of action follows the person of the wrong-doer, and he may be sued therefor wherever he is found and can be served with process.¹ These are not only personal, but are torts at common law.² The courts of England have always, in times of peace, entertained actions of trespass of a personal nature, for injuries inflicted in other countries, not only in behalf of English subjects, but between foreigners, where service could be had, and this, too, not only for causes of action arising within the realm, but out of the realm, and within or without the king's foreign dominions; so that, if a person commits a tort upon the person, or personal property, of another, in a foreign kingdom, an action may be maintained in England therefor, if the wrong-doer be found there and service be had upon him, and the formal venue may be laid in England.³ This being, then, the well-settled law in England as between subjects of States entirely foreign to each other, the rule is necessarily no less liberal between States, though independent of each other, yet so interwoven in nationality and domestic relationship as are the several United States.

Actions Ex contractu. As to such being the law in cases *ex contractu* there has never been any doubt. In the case of *McKenna v. Fiske*,⁴ the Supreme Court of the United States, WAYNE, J., delivering the opinion, it is said: "If A. becomes indebted to B., or commits a tort upon his person, or personal property, in *Paris*, an action in either case may be maintained against A. in England, if he is found." And so Lord MANS-

¹ *Gorman v. Marsteller*, 2 Cr. C. C. 311; *Livingston v. Jefferson*, 1 Brock. 203; *Northern Ind. R. R. Co. v. Mich. Cent. R. R. Co.*, 5 McL. 444; *S. C.*, 15 How. 233.

² *McKenna v. Fiske*, 1 How. 241, 248, 249; *Mitchell v. Harmony*, 13 How. 115.

³ *McKenna v. Fiske*, 1 How. 241;

Rafael v. Verelst, 2 Wm. Black. 1055; *Neale v. De Garay*, 7 T. R. 243; *The King v. Johnson*, 6 East. 583, 598; *Mostyn v. Fabrigas*, Cowp. 161; *Scott v. Seymour*, 1 Hurl. & C. 219. See *infra*, of this chapter, where the subject is treated more at large.

⁴ 1 How. 241.

FIELD, in *Mostyn v. Fabrigas*,¹ says that there is not a color of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas. In such actions the liability follows the person of the aggressor, and may be enforced in any State where he is found, and where the comity of States, as to the right of action by non-residents, prevails.²

Actions for Common Law Personal Torts, Committed in One State, Lie in Others. We take it, then, to be a well-settled principle of the law that actions at common law, for personal torts, that is, for injuries to the person, the personal property, or reputation of another, deemed such at common law, and not originated by statute, may be maintained against the aggressor, in the courts of the American States, of general jurisdiction, where ever, and in whatever of these States, the defendant may be found, without regard to the place where the cause of action originates;³ and also in the circuit courts of the United States, when the citizenship of the parties and the amount involved are such as to confer jurisdiction on these courts.⁴

The case of *Curtis v. Bradford*, garnishee, was a proceeding *in rem*, by garnishee process, in a State court of Wisconsin. The claim was of damages for an injury sustained by plaintiff, a passenger injured in Michigan, while getting on to the Milwaukee & Detroit railroad car, and Bradford, the person garnished, was local ticket-agent of that company in Wisconsin. The railroad company was a corporation of the State of Michigan, and had no local agent in Wisconsin, as alleged by plaintiff, on whom it was competent to make service, so as to obtain actual jurisdiction

¹ Cowp. 161.

² *Gardner v. Thomas*, 14 John. 135; *Johnson v. Dalton*, 1 Cow. 543. But where the tort is committed on board a foreign vessel, the courts of another country, into which the parties come, and where suit is brought, will decline the jurisdiction and remit the parties to the courts of their own country for redress. *Gardner v. Thomas*, *supra*. See, as to this point, also, *Wilson v. McKeuzie*, 7 Hill, 219.

³ *McKenna v. Fiske*, 1 How. 241, 248, 249; *Glen v. Hodges*, 9 John. 67;

Mitchell v. Harmony, 13 How. 115, 137; *Gardner v. Thomas*, 14 John. 135; *Phila., Wil. & Balt. R. R. Co. v. Quigley*, 21 How. 202. The case of *Mitchell v. Harmony* was for a tort committed to personal property in the Republic of Mexico, and jurisdiction was maintained in the American courts. *Curtis v. Bradford*, 33 Wis. 190; *Cooley on Torts*, 470.

⁴ *Phila., Wil. & Balt. R. R. Co. v. Quigley*, 21 How. 202; *Mitchell v. Harmony*, 13 How. 115, 137.

of the railroad corporation; but Bradford, the garnishee, had money in his possession belonging to the company, as admitted by his answer. What the character of the injury was is not shown. Nor is it shown whether the action was statutory, or as at common law. No defense was made for the railroad company, and judgment was sustained against the garnishee for the amount found in his hands. Taken altogether, the case shows no more than an ordinary common law *tort*, so that it was well held that the right of action was a transitory one, on which an action lies in the courts of one State for a personal injury sustained in another State.¹ But it is not to be confounded with statutory actions for personal injuries, or statutory actions for injuries causing the death of a person; for nothing of either character is indicated by the case. From the character of the cases cited by the court, to the point that the action was transitory, it would seem that the injury complained of was one proceeding from an ordinary common law tort, or act of negligence.

Action of Trespass on the Case Lies in any State. The common law action on the case, or such action in form as by State legislation is substantially substituted therefor, as a remedy for injury to person or reputation, or other personal injuries of an indirect or consequential effect, will lie in the courts of the several States at the suit of citizens or residents of other States, whether the injury sued for be committed in one State or the other, or in an entirely foreign state or kingdom, if the defendant be found and served with process in the State where sued.²

Transitory Actions in United States Circuit Court. And so, too, in the United States Circuit Court for any district, if the citizenship of the parties and sum or value in controversy be such as in these respects to confer jurisdiction.³ Thus it is settled that the common law action on the case, for a libel, lies in the United States Circuit Court, at the suit of a citizen of a State against a private corporation of another State and district wherein the court is held.⁴

¹ Curtis v. Bradford, 33 Wis. 190.

² McKenna v. Fiske, 1 How. 241, 248, 249; Mitchell v. Harmony, 13 How. 115; Glen v. Hodges, 9 John. 67; Gardner v. Thomas, 14 John. 135; Phila., Wil. & Balt. R. R. Co. v. Quigley, 21 How. 202; Mostyn v. Fabrigas,

Cowp. 161; Scott v. Seymour, 1 H. & C. 219; The King v. Johnson, 6 East. 583; Neale v. De Garay, 7 T. R. 243.

³ Phila., Wil. & Balt. R. R. Co. v. Quigley, 21 How. 202.

⁴ Phila., Wil. & Balt. R. R. Co. v. Quigley, 21 How. 202.

Action of Slander. An action of slander lies in the State wherein the words are spoken, charging a person with larceny committed in another State, for although the alleged crime be not punishable in the State where the words are spoken, and is only cognizable in the State where committed, yet a party thus charged is liable to be demanded by the authorities of such other State, and so be delivered over to be tried therein: Moreover, it is not alone the liability to be subjected to punishment that is of the essence of the right of action, but the injury to character and necessity of vindicating the same; and notwithstanding the public prosecution may be barred by the statute of limitations.¹

Action for Malicious Prosecution. So an action for malicious prosecution lies in a court of one of the United States for oppressive legal proceedings and arrest instituted and enforced against one in a court of Canada; and the right of recovery is neither modified nor barred by any statute of Canada tending to limit the same.²

It is like an action at common law for personal injury incurred in one State, which will lie in the courts of another State, at the suit of the injured person.³

Personal Common Law Injuries Suable wherever the Wrongdoer is Found. It follows from the foregoing conclusions and authorities that in all such *purely personal* actions of a transitory nature for *torts at common law*, a citizen of a State may sue a citizen of another State, in the courts of such other State, or of any State wherein he may reside, or may be found and served with process, and without regard to the place or State in which the injury may have been perpetrated.

So, also, in the circuit-court of the United States for any district, if the defendant be an inhabitant of the district, and the plaintiff be a citizen of a different State than the one in which

¹ Van Ankin v. Westfall, 14 John. 233; Owen v. McKean, 14 Ill. 459; Teagle v. Deboy, 4 Blackf. 134; Townsend on Slander and Libel, §§ 110, 268. The same rule governs as to a libel.—*Ib.* In the very late case of Dufresne v. Weise (1879), 1 Wis. Leg. News, 209, it was held that slander, accusing another with having done an act in another State, which

act is not of itself a crime in the place where the slander is uttered, but is a crime in the State where the act charged is said to have been committed, is governed by the law of the latter State, and is therefore slanderous *per se*.

² Brown v. McIntire, 43 Barb. 344.

³ Ackerson v. Erie R. R. Co., 2 Vroom, 309.

the suit is brought, and the sum or value involved in controversy be over five hundred dollars, exclusive of costs. The right of action in these cases rests upon general principles, alike binding everywhere, and may therefore be everywhere enforced, and in this respect is unlike a right of action created by local statute, as matter of local policy, and which is enforceable only where the right is given and the statute exists. The latter is local, not as savoring of the realty, however, but as existing only by the local law or statute, which can have no *extra-territorial* force.

Actions which are Given by Statute are Local. Where certain acts are made wrongs, by statute, which were not such theretofore, or additional remedies are provided by statute to those which existed by the common law, in either case advantage can be taken of the same only within the territory or locality wherein the law has force. These are new rights, so to speak, and depend for their enforcement always upon the statutes by which they are created. And such statutes will be enforced only by the courts of the State wherein they are enacted.¹

III. ABATEMENT, AND BAR OF ACTIONS.

Other Action Pending in Different Jurisdiction. It is no cause for the abatement of an action or suit, in a State court, that the plaintiff has pending against the same defendant another action or suit, in a court of another State, for the same cause of action.²

¹ Woodward *v.* Michigan, etc., R. R. Co., 10 Ohio St. 121; Richardson *v.* N. Y. Central R. R. Co., 98 Mass. 85; Whitford *v.* Panama R. R. Co., 23 N. Y. 465. See next chapter, *infra*, § III.

² Hogg *v.* Charlton, 25 Penn. St. 200; Williams *v.* Ayrault, 31 Barb. 364; De Armond *v.* Bohn, 12 Ind. 607; Rogers *v.* Odell, 39 N. H. 417; Eaton & Hamilton R. R. Co. *v.* Hunt, 20 Ind. 457; Bradley *v.* Bank of Indiana, 20 Ind. 528; Yelverton *v.* Conant, 18 N. H. 123; Humphries *v.* Dawson, 38 Ala. 199; Seevers *v.* Clement, 28 Md. 426; Davis *v.* Morton, 4 Bush, 442; Loyd *v.* Reynolds, 29

Ind. 299; Lyman *v.* Brown, 2 Curtis, 559. In this case, CURTIS, J., says: "It seems to me that the grounds upon which the plea of a prior suit pending has been held to be sufficient to abate the second suit, is not applicable where the second suit is pending in a foreign country, or even in another State of this Union. The ground I understand to be that the defendant shall not be twice vexed for the same cause of action, where the court can see that in each the remedy is substantially the same." 2 Curtis, 559, 560. The learned justice puts the case upon the reasonable principle that the court wherein the

A party having a right of action may proceed thereon against one and the same defendant, or defendants, in the courts of two or more States, at one and the same time, if the cause of action be a transitory one, but there can be but one satisfaction.¹

It seems, however, that the pendency of a suit in a Federal court will be good cause for abating a suit between the same parties, and involving the same subject matter, commenced in another Federal court.² It has also been held that the pendency of a suit in the State court may be pleaded in abatement to a suit subsequently brought by the same parties, and for the same cause, in the circuit court of the United States.³ But this is not so clearly established, as will be seen from the cases cited in the note. Where concurrent jurisdiction is entertained by different courts, the better reason seems to be that the one first obtaining cognizance of the case should be a bar to the other. Comity demands it, and the additional fact that otherwise the judgments of the two courts might conflict. But this might be avoided, provided, as soon as judgment is obtained in one court, there would be a stop put to the case pending in the other. And this would give rise to a race of diligence in the courts.

Judgment in Another State a Bar or Cause for Abatement. But, although an action pending in another State is no bar to a suit or action, for the same cause of action, in a State court, or cause for abating the same, yet the general ruling is that recovery of a judgment in another State for the identical cause of action is a bar to an action in the court of a State, or United States, for by such recovery the cause of action is extinguished, or merged in the judgment, and no longer exists as a ground of recovery.⁴

plea of *lis pendens* is pleaded, ought to be able to see, by inspection of the proceedings relied on in the other action, that the character thereof is such as to subject the defendant to a double recovery for the same cause of action, before allowing the same as a cause of abatement. See, also, *McJilton v. Love*, 13 Ill. 487; *Brown v. Joy*, 9 John. 221.

¹ *Hogg v. Charlton*, 25 Penn. St. 200, and cases cited above.

² *Ex parte Balch*, 3 McL. 221; *Earl*

v. Raymond, 4 Id. 233; *Hacker v. Stevens*, 4 Id. 535.

³ *Earl v. Raymond*, 4 McL. 233; *U. S. v. Wells*, 11 Am. L. Reg. (N. S.) 494. *Contra*, *White v. Whitman*, 1 Curt. 494; *Whitaker v. Brainson*, 2 Paine, 209. See, also, *Walsh v. Durkin*, 12 John. 99; *Mitchell v. Bunch*, 2 Paige, 606; *Burrows v. Miller*, 5 How. Pr. 51; *Strong v. Stevens*, 4 Duer, 668.

⁴ *North Bank v. Brown*, 50 Maine, 214; *Bank of North America v.*

But to be a bar the adjudication must be of the principal matter in controversy, and must be final, upon the merits; it is not sufficient if merely of some collateral or interlocutory motion or proceeding, to bar another action or suit for the principal cause of action involved, or to bar a like motion for a collateral or interlocutory order or proceeding, though the principal subject matter of the two suits be the same, if of such principal subject matter there be not also a former adjudication pleaded and proven.¹

Wheeler, 28 Conn. 433; Cin., etc., R. R. v. Wynne, 14 Ind. 385; Child v. Eureka Powder Works, 45 N. H. 547; Barnes v. Gibbs, 2 Vroom, 317; McGilvrey v. Avery, 30 Vt. 538; Rogers v. Odell, 39 N. H. 452. And the application of this rule will not yield to the fact that an appeal has been taken from the judgment. Bank of North America v. Wheeler, *supra*. Neither

will the rule yield to the fact that there is no property of the defendant in the State where the judgment was obtained, but that there is property where the second suit is attempted to be brought. Child v. Eureka Powder Works, 45 N. H. 547.

¹ Brinkley v. Brinkley, 50 N. Y. 184, 202; Lazier v. Wescott, 26 N. Y. 146; Walsh v. Durkin, 13 John. 99.

CHAPTER XV.

PENAL AND STATUTORY ACTIONS NOT ENFORCEABLE IN OTHER STATES.

- I. ONE STATE CANNOT ENFORCE THE STATUTES AND PENAL LAWS OF ANOTHER.
- II. A STATE CANNOT, IN VIRTUE OF ITS OWN PENAL LAWS, PUNISH ACTS COMMITTED AGAINST THE LAWS OF ANOTHER.
- III. STATUTORY ACTIONS FOR DEATH OF A PERSON.
- IV. STATUTORY REMEDY, BY INDICTMENT, FOR DEATH OF A PERSON.
- V. STATUTORY ACTION FOR PENALTY FOR USURY.

I. ONE STATE CANNOT ENFORCE THE PENAL LAWS OF ANOTHER.

Statutory Penalties. Statutory penalties can only be enforced in the courts of the State by the laws of which they are imposed; they cannot be enforced elsewhere either by force of the statute creating them, nor upon the principles of comity.¹ Thus, where the capital stock of a banking corporation was limited in amount by law, and a penalty provided for excess of increase thereof, as a forfeiture of the excess, it was held that there could be no *extra-territorial* enforcement of the forfeiture.² And so, where a note was made in one State, and payable therein, with usurious provisions, subjecting the parties to a penalty to be paid to the State in behalf of the school fund, under a statute which required judgment in favor of the State to be rendered for such penalty, in case of suit upon the note, and an action to enforce payment of the note was prosecuted in another State, it was held that the courts of such other State could not render judgment

¹ First Nat. Bank of Plymouth v. Price, 33 Md. 487; Derrickson v. Smith, 3 Dutch. 116; Halsey v. McLean, 12 Allen, 439; Graham v. Monsergh, 22 Vt. 543; Slack v. Gibbs, 14 Vt. 357; Indiana v. Helmer, 21 Iowa, 370; Scoville v. Canfield, 14 John. 338, 340; De Wolf v. Johnson, 10 Wheat. 367; Van Shaik v. Edwards, 2 John. 355;

Van Reimsdick v. Kane, 1 Gall. 371; Arnold v. Potter, 22 Iowa, 194, 204; Richardson v. Burlington, 33 N. J. 190; Tanner v. Allen, Litt. Sel. Cases, 25; Barnes v. Whitaker, 22 Ill. 606; Sherman v. Gasset, 9 Ill. 521.

² First National Bank of Plymouth v. Price, 33 Md. 487.

for the penalty, and judgment was rendered for merely the sum justly due.¹ In disposing of this case, the Supreme Court of Illinois, CATON, J., said: "With the penalties imposed by the law upon the usurers, for their violation of it, we have nothing to do. That is a matter between the State of Iowa and her citizens. We cannot punish her citizens for violating the laws to which they owe obedience. We cannot render judgment in favor of that State for the benefit of her school funds for the penalty or forfeiture of ten *per cent.* per annum, which this law imposes. We have no jurisdiction to vindicate the violated majesty of her laws, as was held in *Sherman v. Gassett*.² That task must be left to her own tribunals."³

II. A STATE CANNOT, IN VIRTUE OF ITS OWN PENAL LAWS, PUNISH ACTS COMMITTED AGAINST THE LAWS OF ANOTHER STATE.

Penal Statutes and Punishments are Local. Acts rendered penal by law are penal only because the law makes them so; and they are, therefore, only penal if committed where the law is in force that makes them penal. It follows from this that although the laws of a State render certain acts penal, yet they are only so when the acts are committed in that State. If committed elsewhere, they are not penal, except as they may be against the law of the place where committed. If the penal laws of two States be the same, it does not follow that an act committed in one of the States, violating the penal law of that State, also violates the penal law of the other State; but, on the contrary, it only violates the law of the State wherein it is committed. It does not violate the law of the other State, for the reason that the law of such other State had no force where the act was committed; and where there is no law there is no legal wrong.

Hence it is, that the penal or criminal laws of one State cannot be invoked by such State to enforce penalties incurred, or to punish acts done in a different State. And it does not matter whether the supposed penalties be to the public or to persons: the rule and the reason thereof are the same: penal laws of one State are never enforced against acts committed or penalties incurred in other States.⁴

¹ *Barnes v. Whitaker*, 23 Ill. 609.

² 9 Ill. 521.

³ 22 Ill. 609.

⁴ *Graham v. Monsergh*, 22 Vt. 543.

In this case, *Graham v. Monsergh*, the question involved was one of bastardy, which occurred in another State. That is, all the circumstances, including the birth of the child, transpired outside the territorial limits of Vermont, and the parties were, at the time of the occurrences, non-residents. The child was born in the State of New York. The proceeding was had under the statute of Vermont. Objection thereto, and a motion to dismiss, was made on the ground that the statute could "not extend to children begotten and born in a foreign country." At the time of the arrest the mother was temporarily within the State of Vermont, and the child was in the keeping of a family residing therein. The reputed father was arrested in that State. The motion to dismiss being overruled, defendant excepted. The case was then tried on plea of *not guilty*; a verdict for complainant and order of affiliation was entered against him under the statute. The case was taken to the Supreme Court, and the whole court agreed that such a proceeding was, in its nature, confined to causes of action arising within the State. The learned Justice REDFIELD, delivering the opinion, says: "And if we allow a case which accrued in a neighboring State or province to be brought into our courts, we could not exclude such a case coming from Japan, or Farther India, or Kamschatka; or if we admit such cases to come into our courts from countries where similar laws exist, we must, equally, from countries where no such laws exist, and, for aught we can perceive, from those countries where polygamy is allowed to the fullest extent. We should thus be liable to become engaged in a species of knight-errantry, in a ludicrous attempt to redress the wrongs and regulate the police of other countries, in matters which very little concern us. The truth is, the proceeding is altogether a matter of internal police, and, in its very nature, as exclusively local as is the administration of criminal justice. It is not necessary here to consider how far the case of a woman, *bona fide*, coming into this State to reside, before the birth of the child, might merit a different consideration. It is supposable, too, that, should the birth of such a child occur during the temporary absence of the mother from the State, with the continuance of the *animus revertendi*, she might, on her return to the State, be entitled to proceed against the father under the statutes." The proceeding was or-

dered to be dismissed.¹ The case cited, *Indiana v. Helmer*, involved a question arising out of a bastardy proceeding in Indiana, under the statute of that State, which proceeding was matured into a judgment against the defendant in Indiana, and the suit in Iowa was against the same defendant, on the judgment. The judgment, though regularly authenticated, was, with the proceedings of the cause in Indiana, of so irregular a character that an attempt was made to avoid its force by showing it to have been obtained under the penal statutes of Indiana, and on the assumption that those statutes would not be enforced in another State. But the Iowa court, admitting that such would be the law if the proceeding was based on the Indiana statute, decided that the irregularities of the judgment did not void its validity while unreversed, and that as there was jurisdiction of the defendant in Indiana, the judgment itself would sustain the action and shut out all enquiry as to the subject matter on which it was rendered. In this case the court, COLE, J., say, however, as to the extra-territorial force of such statutes: "If the mother of the bastard child, begotten and born in the State of Indiana, had come to Iowa, and sought by legal proceedings to compel the defendant, its father, to support it, and to give bond therefor, and otherwise comply with the requirements of the statutes of Indiana, the answer of the defendant that the subject matter of such action was one of merely local police regulation of Indiana, and not enforceable in this State, would have been conclusive, and amount to a complete defense." The court then add that such action could no more be maintained beyond the limits of the sovereignty within which it arose than can an action for any other penalty provided by statute of such sovereignty for the wrongful act of a defendant therein; and that both are alike matters of local and internal police, and enforceable alone by the sovereignty making the regulation and providing the penalty.² The case of *Richardson v. Burlington* was also a bastardy proceeding. The mother became *enciente* in the State of New Jersey, being a servant there, but not having gained a residence in any particular town; before the birth of the child she left the State and became an inhabitant of the State of Pennsylvania, in which latter State

¹ 22 Vt. 545, 546.

² *Indiana v. Helmer*, 21 Iowa, 370, 372.

the child was born. Still remaining a resident of Pennsylvania, she returned to New Jersey and instituted the prosecution against the alleged father; an order was made against him under the statute, which, on *certiorari* to the Supreme Court, was set aside on the ground that the case was not within the statute. The court say the statute "was not intended for the relief of other States or their townships;" nor was it intended "to maintain the bastards of such lewd women as may come into a township and stay just long enough to become impregnated, and then depart, and afterwards, in some foreign jurisdiction, give birth to their illegitimate conceptions."¹ In the Vermont case above cited, *Graham v. Monsergh*, the difficulty occurred in Canada; the child was born in New York, and the proceedings were set on foot in Vermont, where the alleged father was found. In the case cited from New Jersey, *Richardson v. Burlington*, the trouble originated in that State where the woman was temporarily in service; she afterwards became an inhabitant of Pennsylvania, and in that State the child was born. The mother then went temporarily into New Jersey, found the father of the child, and there commenced proceedings against him under the statute. It is seen that these bastardy statutes are regarded as penal statutes and police regulations, and that, having no extra-territorial force, they do not apply to cases occurring in other States; and that, on the other hand, the statutes of the other States, where the cases, by the births, occurred, had no force inside of the territorial limits of the States where the proceedings were invoked: that is, were not the law of the *forum*. In other terms, that all such penal and police statutes, on whatever subject, are *local*. In Wisconsin there is a contrary ruling, but it is put upon this principle, as alleged, the obligation to support the child arising from paternity, saying nothing about the statute or obligation of the statute. The case was this: Conception occurred in Wisconsin, but the birth occurred in Illinois; after a time the mother returned to Wisconsin and instituted proceedings under the statute against the alleged father. The court sustained the jurisdiction without making any reference to the statutory liability, but upon the general principle of an obligation of the parent, which, though recognized as to legitimate children, is not, as we con-

¹ 33 N. J. 192.

ceive, except by statute, as to such as are illegitimate. In the Wisconsin case, the court having been referred to the case above cited, of *Graham v. Monsergh*, avoid the force thereof by resting their decision on the obligation of paternity alone. The court say, COLE, J.: "The obligation of the father to support a bastard child grows out of the paternal relations existing between him and such child, and we therefore deem it quite immaterial, so far as his obligation and duty are concerned, whether the child is born out of the State or not."¹ We do not regard this Wisconsin case as an authority *in a legal* point of view, however strong the moral obligation. But, irrespective of its soundness, it does not militate against the principle assumed as law by us in the matter here under discussion, as to the extra-territorial enforcement of penal statutes.

The case of *Slack v. Gibbs* is another one strongly illustrative of the principle here asserted. By the statute of Vermont, a conveyance of property made to defraud creditors, is made a penal offense as against the parties to such conveyance. A debtor citizen of that State, being on his way, with horses for market, to Boston, made, as alleged, a fraudulent conveyance of them in New Hampshire, while passing through that State, and with intent to defraud his Vermont creditors. In an action for the penalty, instituted in a court of Vermont, the court held that such action would not lie, under the statute of Vermont, for a fraudulent conveyance made in another State; and, though the Supreme Court, on another point, reversed the judgment, they ruled, however, with the court below, that the action would not lie in a case where the act prohibited was committed in another State.² In the same case, the Supreme Court of Vermont, WILLIAMS, J., say: "A conveyance of property, however fraudulently intended or conceived, made in another State, cannot be a breach of our penal laws, or subject the party to a penalty therefor. Our laws are of no efficacy out of the territorial limits of the State, and however immoral a transaction may be, committed in another jurisdiction, it cannot be punished here as a violation of the laws of this State."³

To the effect that the statutory actions of one State cannot be

¹ *Duffles v. The State*, 7 Wis. 672.

² *Slack v. Gibbs*, 14 Vt. 357. And though it was a *qui tam*, yet such ac-

tions in Vermont are civil actions.

Waters v. Day, 10 Vt. 487.

³ *Slack v. Gibbs*, 14 Vt. 364.

enforced in another State, nor actions arising on statutory liabilities, it is ruled in Vermont that the bond of a guardian taken in another State, in the probate court of such State, under a law prescribing the conditions and terms of liability thereon, cannot be enforced in a different State. In the case referred to, the court, PIERPONT, C. J., say: "The bond is purely a creature of the statute law of New Hampshire, taken according to its requirements, and for a purpose specified and declared by such law. * * * The whole proceeding was understood and intended to be local in its operation, to be consummated in that State, and under its laws."¹

There is a late ruling in Illinois that the expectant mother of an illegitimate child may follow the putative father into, and prosecute him in, that State, for bastardy, under the statute of Illinois, although she be a resident of another State, in which the trouble occurred, and of which both parties were citizens at the time the act was committed by which she became pregnant, and although the child be not yet born. The objection was raised, on the trial, that the complainant was not, and never had been, a citizen or resident of Illinois, but it was overruled by the lower court, and the judgment was affirmed in the Supreme Court. The Supreme Court say: "The case is certainly within the letter of the law. The majority of the court do not feel at liberty to hold that the operation of the statute is limited in this respect by implication."² No authorities are cited.

It will not do to liken the *inter-State* right of suit, in statutory actions, though they be in their nature transitory in the State where they accrue, to the right to sue in transitory cases in different counties — suits in the same State where the actions accrue. In the latter case, the *sovereignty* is still the same, and the statute is in force in all the counties throughout the territorial boundaries of that *sovereignty*; whereas, in the former, the statute giving the right of action is of no force, *in proprio vigore*, outside of the State by which it is enacted.

Difference between Common Law and Statutory Transitory Actions. There is this difference, in that respect, as to the prosecution of common law rights of transitory actions in one State

¹ Judge of Probate v. Hibbard, 44 Vt. 597; Pickering v. Fisk, 6 Vt. 102.

² Koble v. People, 85 Ill. 336. The

court regarded the statute as intended mainly for the personal benefit of the woman.

or country, which have accrued in another, and are of a personal and transitory character, and are based on contract rights or personal injuries recognized as such by the principles of universal law. These are maintainable in all countries, wherever there are tribunals that take cognizance of and vindicate such rights and injuries; not, however, because of the local law of such countries, but because of the universal law, which gives and vests such right of action, and which exists everywhere, whether locally enacted or not.¹ In such case, although the *remedy* is given by the law of the *forum*, yet the *right of action* is given by, and bears relation to, a universal law of civilization; thus, if a man be assaulted or beaten on a previously unknown island, where there is no law, and on which the parties are casually thrown, yet a right of action therefor exists, and may be enforced, in any state or country where there are courts that adjudicate personal rights, if the aggressor is there found and served with the local process. So, if in such place hitherto unknown a contract, not immoral or wrong in itself, be made by parties, and for a valuable consideration, the right thereon, if of a transitory nature, by the common or civil law, may elsewhere be sued and enforced, in the courts of all countries where there are tribunals for the enforcement of personal rights, and this, too, upon the principle of universal law. The only question, in either case, is the question of *comity*, as to the right of an alien or citizen of another State to sue, if the plaintiff be such; but if the plaintiff be a citizen or subject of the State or country where the suit is brought, then no question whatever as to his right to legal redress can arise, except the necessity of making out a cause of recovery.

III. STATUTORY ACTIONS FOR DEATH OF A PERSON.

There is a species of actions, of modern origin, which are alike unknown to the common law and to the ordinary body of the *qui tam* and other statutory actions. Though local they are not real actions: though personal, they are not transitory. They are given by statute, are of a police nature, and can only be brought and enforced in the State where the statute that gives them, and

¹ Gardner v. Thomas, 14 John. 135; Johnson v. Dalton, 1 Cow. 543; McKenna v. Fiske, 1 How. 241.

under which they occur, is in force.¹ They are not strictly *qui tam* actions, but yet they are of a penal and police nature, their object being as well for security of the public against accidents and wrongs as to afford personal compensation to those who suffer from the acts and omissions which, by these statutes, are made actionable.²

Of this class of actions are those given by statute for the death of a person, when caused by a wrong act, or negligence; actions given by statute to the wife, for inducing drunkenness of the husband by selling to him intoxicating liquor; actions against railroad corporations for injuries to live stock upon their roads, where they have omitted to fence their roads; penalties for taking excessive rates; penalties for usury; actions given by statute against the employer, for a personal injury to a servant, caused by the negligence of a co-servant; and other statutory actions of like character.

To illustrate more fully the impracticability of enforcing these actions in the courts of a different State than that wherein they accrue, and by statute are given, we will briefly advert to the nature and remedy of some of them separately.

Unknown to the Common Law. The actions are of recent origin, both in England and in America. They exist only by statute. No such actions lay at common law. These statutes not only confer right of action, some of them allowing suit by

¹ Whitford v. Panama R. R. Co., 23 N. Y. 465; Pickering v. Fisk, 6 Vt. 102; Judge of Probate v. Hibbard, 44 Vt. 597; Woodward v. Mich. So. & Indiana R. R. Co., 10 Ohio St. 121; Richardson v. New York Cent. R. R. Co., 98 Mass. 85; First Nat. Bank of Plymouth v. Price, 33 Md. 487; Derickson v. Smith, 3 Dutch. 116; Halsey v. McLean, 12 Allen, 439; Selma, Rome & Dalton R. R. Co. v. Lacey, 43 Geo. 461; Nashville & Chat. R. R. Co. v. Eakin, 6 Cold. 582; Holland v. Pack, Peck, 151; Cherry v. Slade, 3 Murphy, 82; Southwest. R. R. Co. v. Paulk, 24 Geo. 356; Hover v. Penn. R. R. Co., 25 Ohio St. 667; Western & Atl. R. R. Co. v. Strong, 52 Geo. 461; McCarthy v. Chi., R. I. & P. Ry. Co., 18 Kansas, 46.

² Blair v. Mil. & Prairie du Chien R. R. Co., 20 Wis. 254, 258; Corwin v. New York & Erie R. R. Co., 13 N. Y. 42; Mayberry v. Concord R. R. Co., 47 N. H. 391; Gorman v. Pacific R. R. Co., 26 Mo. 441; Trice v. Hannibal & St. Jo. R. R. Co., 49 Mo. 438; Penn. R. R. Co. v. Riblet, 66 Penn. St. 164; Flint & Pere Marquette R. R. Co. v. Lull, 28 Mich. 510; Bulkley v. New York & New Hav. R. R. Co., 27 Conn. 479; New Albany & Salem R. R. Co. v. Tilton, 12 Ind. 3; Ohio & Miss. R. R. Co. v. McClelland, 25 Ill. 140; Ill. Cent. R. R. Co. v. Carraher, 47 Ill. 333; Fisher v. N. Y. Cent. R. R. Co., 46 N. Y. 644; Indiana v. Helmer, 21 Iowa, 370.

certain of next of kin, and some by the administrator or executor of deceased, but also designate the beneficiaries of the recovery, and direct to whom the same shall be paid. Others, in default of there being such beneficiaries, direct the money recovered to go as assets of the general fund of the decedent's estate. Some of them fix a maximum sum, beyond which there is to be no recovery; others leave the amount to the jury; others again lay down an arbitrary sum, which is to be recovered in all cases of conviction. In *New York* the action belongs to the personal representatives of the deceased, and proof of actual damages is not necessary to a recovery.¹ But the husband is not entitled as for the death of his wife; it is only to the personal representatives, and if the injury had she lived would have sustained an action by herself and husband.² In *Illinois*, the action is to the personal representatives.³ So, in *Wisconsin*, the action is to the personal representatives; and when the recovery is for the widow the measure of damages is the pecuniary loss in not having the support of the deceased, to herself and children, and the additions he would have made to his property by his earnings.⁴ In *New York*, the husband is not treated as next of kin in distribution of proceeds of recovery for death of his wife.⁵ In *California*, exemplary damages may be given.⁶ In *Iowa*, the action for the death of an infant is limited in recovery to the probable earnings after attaining to his majority, and suit is to be in the name of the administrator; for loss of service during minority, the father is to sue, or if no father, or by the father abandoned, then proceedings are at the suit of the mother.⁷ In *Illinois*, only pecuniary compensation is recoverable: nothing for grief, or suffering, or loss of society.⁸ In *Colorado*, the existence of any kindred named in the statute, gives the action.⁹ In *Illinois*, the injury must be such that the deceased could have maintained an action therefor if he had lived, and there must be left a widow or next

¹ *Keller v. New York Cent. R. R. Co.*, 2 Abb. Dec. 480; *Dickens v. New Y. Cent. R. R. Co.*, 1 Abb. Dec. 504.

² *Green v. Hudson River R. R. Co.*, 2 Keyes, 294.

³ *Barron v. Ill. Cent. R. R. Co.*, 1 Biss. 412, 453; *Hagen v. Kean*, 3 Dill. 124.

⁴ *Castello v. Landwehr*, 28 Wis. 522.

⁵ *Drake v. Gilmore*, 52 N. Y. 389.

⁶ *Myers v. San Francisco*, 42 Cal. 215.

⁷ *Walters v. Chicago, R. I. & Pac. R. R. Co.*, 41 Iowa, 71.

⁸ *Brady v. Chicago*, 4 Biss. 448.

⁹ *Kansas P. R. R. Co. v. Miller*, 2 Col. 442.

of kin: if these requirements are shown a case is made for nominal damages.¹ In *Georgia*, a parent cannot recover for death of an infant child, unless special showing of pecuniary damages.² But by the code, the suit is to the widow and children only.³ In *Massachusetts*, under a statute giving an action for loss of life of railroad passenger, the damages are limited to not over five thousand, nor under five hundred, dollars, recoverable by indictment for the benefit of the widow, if there be one, and of the decedent's heirs.⁴ In *Maine*, likewise, the recovery is limited to five thousand, and not less than five hundred, dollars, and is for benefit of the widow and children, if such there be, and if no widow, then to the children, and in case of no children, then to the widow, if there be one.⁵ And, although recoverable by indictment, the proceeding is regarded as a civil one, and the same rules and principles of law are applied as in an ordinary civil action would be, for the same cause.

We have given these illustrations to show the diversity of provisions on the subject, in the different statutes of the several States.

The Remedy is Local. When we consider that such statutes have no force in other States than where enacted, and that they not only give the right, but, in many cases, prescribe the remedy, and also direct to whose benefit recovery is to inure, we perceive at once the impossibility of enforcing them in other States, even by *comity*, inasmuch as the courts of each State are governed by the local laws in respect to remedies. Take a case arising in *Massachusetts*, where the right to recover is restricted to indictment, would an indictment lie in an adjoining or neighboring State for such a case? Surely not; and, if not, would an action at law? Of course not; for not even in *Massachusetts*, where the injury occurred, could such an action be maintained. But it is, in such a case, not merely a difficulty as to *remedy*, but no *right* of recovery exists, outside of *Massachusetts*, inasmuch as the statute which gives the right is not in force anywhere else than in said State.

¹ Quincy Coal Co. v. Hood, 77 Ill. 68.

² Allen v. Atlanta Street-Railroad Co., 54 Geo. 503.

³ Miller v. Southwestern R. R. Co., 55 Geo. 143.

⁴ Carey v. Berkshire R. R. Co., 1 Cush. 475.

⁵ State v. Grand Trunk Ry. Co., 58 Maine, 176.

If, on the other hand, we take a case arising in New York, it is only by force of the New York statute that it is actionable, and that statute being local, or having no force in Massachusetts, no right of action exists on such a case in Massachusetts, and no recovery can therein be had. Such proceedings are partly of a police nature, and no State can enforce the police or administrative policy or powers of another.

In the case of *Selma, Rome & Dalton Railroad Co. v. Lacey*, above cited, the action was brought in Georgia for the death of a person killed in the State of Alabama. Defendant demurred to plaintiff's declaration, among other causes, substantially on the ground that the action would not lie in the courts of Georgia, for an injury committed in another State, under the statute of such other State giving an action therefor. The demurrer was overruled, and defendant took an appeal from the judgment on the demurrer. The supreme court of Georgia reversed the judgment below, holding that the action would not lie.¹ Were the statutes of each State the same, yet the enforcement of such a right by *comity*, as suggested by the learned judge in the Georgia case above cited, would be none the less impracticable, for one State cannot enforce the penal or police laws, or administer the remedial statutes of another. Neither can a State enforce its own laws of that character upon rights and liabilities created, imposed and existing by and under the statutes of another State. To do so would be pure *usurpation* of authority in the officers exercising such a power.² It is not so much the *similarity* as it

¹ *Selma, Rome & Dalton R. R. Co. v. Lacey*, 43 Geo. 461. In this case the court say, WARNER, Judge: "The right of the plaintiff to recover damages for the homicide of her husband is conferred by a special statute of this State — Code, 2920 — but the statute of this State has no extra-territorial operation, and the courts of this State cannot administer it for the purpose of redressing injuries inflicted in the territory of Alabama. If it had been affirmatively shown that the law of the foreign jurisdiction in which the injury was done was *similar* to that of our own, as to the al-

leged cause of action, then it would have presented a different question." * * * "If it had been alleged in the declaration that the law of the State of Alabama gave to the plaintiff a right of action to recover damages there for the injury, and it had shown what that law was, then the courts of this State might, in the spirit of *comity*, have enforced that law here." 43 Geo. 462, 463. But even then it would have to appear that the laws of the two States in that respect were "*similar*." *Ib.*

² *Foster v. Glazener*, 27 Ala. 391.

is the *universality* of laws of different States that enables them to exercise jurisdiction by *comity*. That law which is universal is necessarily municipal or domestic, and exists as such, whether enacted or not. Moreover, in some States, as we have already shown, the remedy for injuries causing the death of a person is by an indictment, and not in the form of an adversary action. The party through whose wrong act or negligence the death is occasioned is subjected to indictment at the hands of the grand jury. The same law that creates the liability and gives to the kindred the right to compensation fixes the remedy by indictment, in the name of the State, instead of an action by the parties in interest or the administrator of the deceased. Yet the proceeding by indictment is essentially, in other respects, of a civil nature, and the trial is governed by the rules of law pertinent in such cases to civil proceedings.¹ So, in other of the States, the remedy by civil action is expressly confined to certain localities of the State; as, for instance, in the State of Iowa, such actions against railroad corporations may be brought in any county through which the line of their roads run; also, actions for injuries to live stock, as for want of a fence, under the statute rendering railroad companies liable in such cases for double damages, in like manner suable in any county where the line of their road is operated;² that is, by intendment in any such county in the State where the injury accrues, and the law exists that makes it actionable. In such cases the action is not maintainable in other counties, though in the same State; and if not, much less so in an entirely different State. One of the ablest and most recent expositions of this subject is the case of *McCarthy v. The Chicago Rock Island & Pacific Railway Co.*, above cited, decided in the supreme court of Kansas in 1877. The plaintiff sued as administrator of one McCarthy, deceased, who was killed in Missouri through the negligence of the defendant. The deceased resided in Kansas; was taken there when injured; there died, by reason of the injury; administration was there granted to plaintiff; and suit was brought in that State, in the State court; judgment for defendant was rendered on demurrer, and the judgment was affirmed in the supreme court. The causes assigned for demurrer were, substantially:

¹ *Carey v. Berkshire Railroad Company*, 1 Cush. 475; *State v. Grand*

Trunk Railway Company, 58 Me. 176.

² Code of Iowa, 1873, §§ 1289, 2582.

First. That the court had not jurisdiction of the cause.

Second. Want of legal capacity of plaintiff to sue.

Third. That the petition did not embody a cause of action.

The supreme court held that the Kansas statute had no *extra-territorial* jurisdiction, and not being in force where the injury occurred, no action therefor would lie, under the Kansas statute, upon which the suit was brought, and this, too, notwithstanding the fact that the death occurred in the State of Kansas.

In answer to the argument or point made for plaintiff, that the statute of Missouri on the same subject, in the absence of a different showing, was *presumed* to be similar to that of Kansas, and that therefore the action should be sustained under the Missouri statute, the court held, that taking the statutes to be alike, yet such conclusion did not necessarily follow. In this connection the court say, HORTON, C. J.: "Every statute of another State, giving a right of action, cannot be enforced in a spirit of comity in this State, even if such statute is set forth in the petition filed in the court; and a very different principle is involved between presuming the laws of sister States like our own to sustain title to property within this State in litigation, and holding that the laws of other States are similar to ours, in enforcing through our courts either the penal or remedial statutes of such other State."¹

In this case, after referring to most, if not all, of the previously decided American cases, and ably illustrating the impracticability of such *inter-State* jurisdiction, the court affirms the decision of the lower court by a unanimous ruling.

The case of *Whitford, administrator, v. Panama Railroad Company* is a forcible illustration of the same principle. The Panama Railroad Company is a New York corporation, organized under special charter granted by the State of New York, and existing as a corporation in that State, but operating a road built by it across the Isthmus of Panama. A passenger lost his life from an injury received upon that road, resulting from the negligence of the company of such a character as would, if it had occurred in the State of New York, have rendered the company liable under the New York statute giving an action for the death of a person caused by negligence. Whitford took out let-

¹ McCarthy v. Chicago, R. I. & P. R. R. Co., 18 Kansas, 46.

ters of administration in New York upon the estate of the deceased at the place of the decedent's domicile, and brought suit in New York against the company as a New York company, under the statute of New York. The court of appeals held that the statutory action would not lie in that State for injury resulting in the death of a person inflicted within the jurisdiction of another State or country. That the fact of the defendant being a New York corporation, and the deceased being at the time of the injury and his death a citizen of that State did not alter the case in that respect. As to sustaining the action upon the principles of comity, it was held that such privilege extends only to the common law injuries and rights of action and not to actions for a new cause given by statute. The court say: "Plaintiff cannot in this action recover by virtue of our statute, for injuries which occurred to his intestate happening where that statute had no force. It is not necessary to add, that a statute of a State of this Union has no *extra territorial* force."¹ It was held that though the injury be such that the injured person might, if living, maintain a common law action therefor in a different State from that wherein the injury occurred, upon the presumption that the great principles of natural right and justice and of the common law there prevailed at the time of the injury, whereby a common law right of action accrued to the party for the injury and its consequences, yet no such right of action devolves upon the personal representative of the injured person, if death ensue from the injury, for at common law such right of action does not survive; but, on the contrary, the action in behalf of the personal representative is given by the statute and is for a new grievance or injury to a different party, to-wit: for the deprivation suffered by a certain next of kin of their natural support and protection caused by the death, and is made by the statute the subject of a new cause of action.²

The case of *Richardson v. The New York & Erie Railroad Company* was brought in Massachusetts, by a Massachusetts administrator of a person who was killed in the State of New York upon the railroad of the defendant, by reason, as alleged, of the negligence or wrong act of the defendant. The statute of New York gave to the administrator an action in such cases. The suit was predicated on the statute of New York. The case

¹ 23 N. Y. 465, 481.

² *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, 470.

was decided on demurrer, which was as follows: "No action can be maintained in this State by the plaintiff under or by reason of any statute law of the State of New York." The supreme court of Massachusetts held the demurrer well taken, and decided that the action would not lie in that State.

That court held that the right of action conferred was not a right of property, passing as assets to the personal representative of the deceased, but was a specific power to sue created by the local law of New York, and did not pass to the Massachusetts, but only to a New York administrator, and to be exercised in New York.¹

In *Woodward v. The Michigan Southern & Northern Indiana Railroad Co.*,² it is distinctly held that such action will not lie in the courts of one State for an injury and death occurring in another State, although there be like statutes giving the action in both States. The court substantially held that the statute of the State where the injury occurred, and which gave the action, only gave it in that State, and had no force in another State to enforce it in the courts thereof; and that the statute of the State where suit is brought having had no force where the injury was sustained, therefore no right of action accrued in virtue of it, and under it none could be enforced. In short, we may sum up the whole conclusion by adding that to maintain such an action, the law of the *right*, the law of the *remedy* and the law of the *forum* must be identical, or the same, and the *territorial* jurisdiction that in which the injury and death occurs.

Incorporation by Two States. A railroad corporation organized under the laws of two different States and operating its line of road as an entire and continuous line in both States, is liable to suit as a legal result of such acts of incorporation of the two States in the courts of either and each of said States;³ and were it otherwise a provision in the incorporating act of that one of such States in which the principal business place is not situated, that the company shall keep an agent therein on whom legal service may be made, and shall be held to answer in the jurisdiction where service is made and process is returnable, subjects the company to such liability to suit in the last named State.

¹ *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 92.

³ *Richardson v. Vermont & Mass. R. R. Co.*, 44 Vt. 613.

² 10 Ohio, 121.

Such corporation being equally the emanation of two States, if not liable to suit in each would not, upon the same principle, be liable to suit in either, for the objection is equally tenable as to both. Therefore, no such objection is of any legal validity.¹

IV. STATUTORY REMEDY BY INDICTMENT FOR DEATH OF A PERSON.

Remedy by Indictment. In Maine and Massachusetts the remedy given by the statute for wrongfully causing the death of another is by indictment.² In the former State the death must be instantaneous to sustain the proceeding by indictment.³ In Massachusetts, however, an indictment lies whether the death is immediate or some time after.⁴ The object of these statutes is held to be as well to punish the derelict party as to compensate the kindred of the deceased, designated in the statute as the beneficiaries of the recovery.⁵

In case of conviction the penalty or recovery given by law is not less than five hundred nor over five thousand dollars, at the discretion of the jury or court, as the case may be, and judgment for the amount goes in favor of the persons entitled under the law to the benefit of the recovery, and to enable it to be so rendered it is necessary that their existence be averred and their names be set out in the petition or declaration, of which the truth must be found to be such by the jury. If none such be set out, then there can be no recovery. In no event is there any judgment in favor of the State, although the proceeding is in its name.⁶ On the trial the rules of law as in civil proceedings govern.⁷ In regard to inter-State jurisdiction of such cases, arising where the remedy given by the statute is by indictment, it is scarcely necessary to remark that no indictment would lie in a State other than the one wherein this remedy is given by the statute, and wherein the injury and death occur. In other words, a New York or Connecticut grand jury could not indict under

¹ Richardson v. Vermont & Mass. R. R. Co., 44 Vt. 613.

² Commonwealth v. Metropolitan R. R. Co., 107 Mass. 236; State v. Maine Cent. R. R. Co., 60 Me. 490, 492.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ State v. Grand Trunk Ry., 60 Me. 145; Commonwealth v. Howard, 13 Mass. 221; Commonwealth v. Eastern R. R. Co., 5 Gray, 473.

⁷ State v. Grand Trunk Ry., 58 Me. 176.

the Maine or Massachusetts statute for injuries and death occurring in Maine or in Massachusetts. The courts of New York and of Connecticut would have no jurisdiction to carry on such a proceeding, although the States of New York and Connecticut might have "*similar*" statutes of their own, but which, however, is not the case.

The bringing of some of these prosecutions is limited to one year by the statute where given.¹ Now if an effort be made in a different State to enforce them where the limitation is different, which rule of law is to govern? If the general principle of law is applied that the statute of limitations goes to the remedy, and that, therefore, in that respect the law of the *forum* will be applied, then the prosecution may be restricted to a less time or enlarged to a greater time thereby than contemplated by the statute giving the right and limiting the time of the remedy; and yet as the same statute that gives the right also fixes the limitation, it would seem that the party claiming the benefit thereof should take it *cum onere*, that is with all its burdens, take it as limited. Under any view of such cases, being of a police and administrative character as they undoubtedly are, it would seem that no remedy can be had in the courts of any State other than the State giving the right of action or providing for the prosecution by its statutes.

V. STATUTORY ACTION FOR PENALTY FOR USURY.

An action will not lie in the courts of one State, for recovery of a penalty given by the laws of another State, upon usurious contracts made and entered into in such other State, nor can judgment be given for the penalty in a proceeding to enforce in such other State the legitimate portion of the contract. The most the court will do in such case is to purge the case of the usurious part of the contract by declining to enforce the usury; it will not go further, and by an affirmative proceeding enforce the *penalty* given for usury by the law of the place of the contract. In the case of *Barnes v. Whitaker*, in the Supreme Court of the State of Illinois, upon a note made in the State of Iowa, and not only usurious by the laws of Iowa, but subjecting the parties, by the Iowa laws, to a penalty for the usury, CATON, J.,

¹ *State v. Grand Trunk Ry.*, 53 Me. 176.

says: "With the penalties imposed by the law upon the usurers for their violating of it we have nothing to do. That is a matter between the State of Iowa and her citizens. We cannot punish her citizens for violating the laws to which they owe allegiance."¹

We have treated fully of this title in connection with the subject of "Interest," to which the reader is referred. As a general conclusion, it may be stated that usury laws are, in their nature, penal, and as such are governed by the general rule that they have no *extra territorial* force and depend for their enforcement upon the *forum* of their *creation*. The courts of our States do not consider themselves the hired administrative and police agents of other States, and do not feel called upon to enforce their penal laws. They will enforce only the usury laws of their own State.²

¹ 22 Ill. 606, 609.

² *Ante*, Chap. VIII. § 16.

CHAPTER XVI.

EXTRA TERRITORIAL FORCE OF LAWS.

- I. THE STATE LAWS HAVE NO EXTRA TERRITORIAL FORCE.
 II. WHAT ACTS DONE UNDER THEM ABROAD ARE BINDING AT HOME.

I. THE STATE LAWS HAVE NO EXTRA TERRITORIAL FORCE IN
 THEMSELVES.

It is a principle universally recognized that laws have no *extra territorial* force. Their authority is limited to the territorial jurisdiction of the State or country that enacts them, so far as their right or power of enforcement or claim to obedience is concerned.¹

Natural or Universal Law. It is true, that there are certain principles of the law that by natural authority are common alike to all civilized countries, whether simply remaining so by the law of nature, or re-enacted or declared by statute, and in either case are but parcel of that same universal law; but these universal laws are no exception to the rule above stated, as to extra territorial force, for they, too, are confined to their own territorial limits. That is, the territorial limits of civilization, and as such become a part of the local law of all civilized States.

Comity of States. Whenever the *municipal* laws proper of one State are recognized and enforced in another, it is merely by *comity* of the latter, and upon the presumption that they are tacitly adopted as to matters of right, when not inimical to its

¹ Story's Conf. of Laws, §§ 29, 38, 278; *Blanchard v. Russell*, 13 Mass. 1; *Pennyoy v. Neff*, 5 Otto, 714; *Foster v. Glazener*, 27 Ala. 396; *Cleveland, Painsville & Ashtabula R. R. Co. v. Pennsylvania*, 15 Wall. 300; *S. C.*, 4 Am. R. W. R. 368; *D'Arcy v.*

Ketchum, 11 How. 165; *Boswell v. Otis*, 9 How. 336; *Cooper v. Reynolds*, 10 Wall. 308; *Thompson v. Whitman*, 18 Wall. 457; 1 *Burges' Colonial Laws*, 5; *Westlake on Private International law*, *132-137.

own laws or policy, or interests of its people.¹ But this comity is never extended to the laws of remedy, but has been generally regarded as extending to matters *ex contractu*,² or such torts as are in violation of natural right regarded as such among civilized people. Natural right being that which has the same force among all men.³

In the case of *Foster v. Glazener* the supreme court of Alabama in denying extra territorial force to the laws of a State, say: "It is a well settled principle of international law, that every attempt on the part of one nation or State by its legislation to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation; and all judicial proceedings in virtue of it are held utterly void for every purpose."⁴ This principle is briefly illustrated in the ancient maxim, that "beyond his territorial boundaries it is not safe to obey a party commanding."

Thus it has been repeatedly ruled, that the courts do not take notice of the statutes of other States. To be respected there, they must be produced and proven.⁵ If this be not done, then the court will presume the law of the other State to be the same as the law of the former.⁶ But it does not follow that when produced and proven they will be certainly enforced; that depends on circumstances.

The Remedy. The law of the remedy of one State will not be enforced in another; nor will such other foreign law be enforced as may be repugnant to the policy or law of the State wherein the attempt is made to enforce them.⁷

Execution on a judgment rendered in Indiana upon a note executed in another State is to be had according to the law of the State of Indiana as existing at date of the Indiana judgment. The law of Indiana at date of the note not being in force where the note was made does not enter into the contract. It is first connected therewith when the contract is merged in judgment.⁸

¹ Story's Conf. of Laws, § 88; Bank of Augusta v. Earle, 13 Pet. 519; Greenwood v. Curtis, 6 Mass. 358; Pearsall v. Dwight, 2 Mass. 84; Gardner's Institutes, 173-175; Wheaton's International Law, §§ 79, 80.

² Blanchard v. Russell, 13 Mass. 1; Story's Conf. of Laws, §§ 278, 556, *et seq.*

³ 7 Co. 12.

⁴ 27 Ala. 396.

⁵ Doe v. Collins, 1 Ind. 24, 26.

⁶ *Ibid.*

⁷ *Ibid.*; Story's Conf. of Laws, § 5, *et seq.*

⁸ *Ibid.*

II. WHAT ACTS DONE UNDER THEM ABROAD ARE BINDING AT HOME.

Although it is true, as a general principle, that the laws of a State can have no force outside of its territorial limits, yet this rule is not a universal one. For, though they have no force there, as a rule of action and local enforcement upon the citizens, property, or interests of such other country, yet they may authorize a State's own citizens there temporarily being, to do acts which, when evidenced and returned as by such law provided in its own territorial limits and local *forums*, shall be there binding as if done at such local *forum* or home.¹ Such, for instance, as allowing by law the citizens of a State who are absent in government service in time of war to vote where for the time being they may be, in State and local elections occurring in virtue of law, at the places of their residence.

So, too, authority to do personal acts not pertaining to such foreign State or country, in such country, for and in reference to the State authorizing the same, and for and in behalf of its citizens, as, for instance, the taking and certifying of depositions of witnesses to be used as evidence in its own courts, may be conferred by law not only upon its own citizens abroad but upon citizens and officers of other States or foreign countries, and the same will be of equal obligation and validity, if so provided by law, when returned in the courts of the State authorizing the same, as they would be if taken in such State.² So, also, of all manner of agencies and official authority of a State, authorized by it to be exercised abroad, as agencies of a fiscal character, and as official power conferred upon persons in any other State and citizens thereof, or upon a State's own citizens residing there, to take and certify the acknowledgment of deeds and other instruments to be used as evidence of right and of title within the State so authorizing the same, and of the validity thereof when duly taken and certified in conformity to the law providing therefor, there never has been any doubt.³ Not to make a parallel between cases arising in the several States of the American Union, and those occurring in governments clothed with all the

¹ State v. Main, 16 Wis. 398, 422;
Story's Conf. of Laws, § 22.

² State v. Main, 16 Wis. 398, 422.

³ Ibid.

attributes of sovereignties, occurrences of the kind which are here the subject of discussion, are transpiring all the time under authority of different countries within the compass of their foreign diplomacy and consulate authority, the latter of which extends judicially in many cases to the trial of controversies between the fellow citizens or fellow subjects of such consul which arise within his consulate, and such trials take place, of course, within the jurisdictional or territorial limits of a foreign State, but they in no wise infringe the sovereignty of the country, and are binding only upon the parties thereto. A prominent example of this exercise of power in a foreign State, to be of validity and force only at home, is seen in the administering of the oath of office in *Cuba* to Mr. King, as Vice-President of the United States, by a committee of Congress thereto authorized by a law of Congress for that purpose enacted, he being there sick and unable to return. But all such laws authorizing acts to be done in other States, are to be regarded more in the light of powers conferred than as embodying authority of a compulsory nature capable of there being enforced. Yet, in the *forum* of the place of their enactment they impart complete validity to such authorized foreign acts with all the force of law.

CHAPTER XVII.

STATUTE OF LIMITATIONS.

- I. THE PLEA OF LIMITATIONS GOES TO THE REMEDY AFFORDED BY THE LAW OF THE FORUM.
 - II. STATE POWER TO LIMIT ACTIONS ON JUDGMENTS OF OTHER STATES.
 - III. STATUTES OF LIMITATIONS DO NOT APPLY TO SUITS BY STATE OR NATIONAL GOVERNMENTS.
 - IV. STATUTES LIMITING SUITS ON JUDGMENTS OF OTHER STATES OPERATE PROSPECTIVELY.
 - V. IN SOME STATES A PREVIOUS BAR IN ANOTHER IS A GOOD PLEA.
 - VI. ABILITY OF A CORPORATION OF ANOTHER STATE TO PLEAD THE STATUTE.
- I. THE PLEA OF LIMITATION GOES TO THE REMEDY AFFORDED BY THE LAW OF THE FORUM.

State Courts. Pleas of the statute of limitations go to the remedy, not to the vital force of the obligation or cause of action, but to the practical right of enforcing it. They are, therefore, governed by the law of the *forum* or place of suit. Hence the several States may enact such reasonable statutes of limitation as they think proper, and such statutes will operate alike against the right of bringing suit or actions on records, judgments and decrees of the courts of other States, and on other contracts or liabilities arising in such other States, as upon the same description of obligations and liabilities respectively in the State where enacted. Therefore, the defense of the statute of limitations set up in the courts of a State to an action therein on a judgment of the court of a different State, is a good defense when true.¹

The Same Rule in the United States Courts. So, likewise, as a defense to an action in the circuit court of the United States

¹ McElmoyle v. Cohen, 13 Pet. 312; Bank of Alabama v. Dalton, 9 How. 522; Miller v. Brenham, 68 N. Y. 83; Scudder v. Union Nat. Bank, 1 Otto, 406; Lincoln v. Battelle, 6 Wend. 475; Ruggles v. Keeler, 3 John. 264; Toulson v. Lachenmeyer, 37 How. Pr. 145; Power v. Hathaway, 43 Barb. 214; Nash v. Tupper, 1 Caines, 402; Townsend v. Jennison, 9 How. 407; Angell on Limitations, § 65; Banning on Limitations, 8.

or other United States court sitting within a State, a plea of the State statute of limitations is a good plea, if truly and well pleaded. The "laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."¹ Thus the statutes of limitations of the several States, if no special provision is made in that respect by Congress, for a rule of decision in the courts of the United States have the same effect as they have in the State courts.² Such statutes are laws of the *forum*, and operate alike upon all within the jurisdiction thereof.³

Action on Judgments of other States. It is well settled, therefore, that to an action on a judgment of another State, the statute of limitations of the State where the suit is brought is a good defense if pleaded, and the same has actually run the length of time requisite to bar the action, and the circumstances as to residence of the defendant in connection therewith, or other requirements of the local law, are such as to bring the case within the bar of the statute.⁴ The statute of limitations goes to the remedy. It is, therefore, a part of the procedure necessarily only of value while enforcing the cause of action. Each State provides its own remedies and will not enforce the remedies of any other. The *lex loci fori* is the guide of the court in their procedure. Foreign contracts, like foreign judgments, must yield obedience to the laws of the *forum* in seeking and obtaining remedies.⁵

So, where a debt was contracted between two citizens of the same State and the debtor afterward removed to Minnesota and

¹ Judiciary Act of 1789, § 34.

² McCluny v. Silliman, 3 Pet. 270, 276, 278; McElmoyle v. Cohen, 13 Pet. 312; Flowers v. Foreman, 23 How. 132; Leffingwell v. Warren, 2 Black. 599.

³ McCluny v. Silliman, 3 Pet. 270, 276, 277; Flowers v. Foreman, 23 How. 132.

⁴ Sohn v. Waterson, 1 Dill. 358; Jacquette v. Hugunon, 2 McL. 129; Pease v. Howard, 14 John. 470; McElmoyle

v. Cohen, 13 Pet. 312; Carson v. Hunter, 46 Mo. 467; Baker v. Brown, 13 Ill. 91; Van Alstine v. Lemons, 19 Ill. 394; Allison v. Nash, 16 Tex. 560. See Richards v. Polgreen, 13 S. & R. 393; Angell on Limitations, §§ 84, 85.

⁵ Harrison v. Edwards, 12 Vt. 648; Le Roy v. Crowinshield, 2 Mas. 151; McElmoyle v. Cohen, 13 Pet. 312; Bank of U. S. v. Donnally, 8 Pet. 361; Ruggles v. Keeler, 3 John. 261; Jones v. Jones, 18 Ala. 248.

there resided the length of time required by statute to bar an action, the statute of limitations of Minnesota was held a good defense to an action in that State on such debt.¹ So likewise as to right of property.²

II. STATE POWER TO LIMIT ACTIONS ON JUDGMENTS OF OTHER STATES.

The limitation of the statute to suits on judgments of another State, must be in reference to the date of the judgment sued on and not the date of the cause of action on which it was rendered. The Legislature of the State of Mississippi enacted a statute of limitations in words as follows: "No action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of such action would have been barred by any act of limitation of this State, if such suit had been brought therein." In an action in said State, on a judgment rendered in the State of Kansas, a plea of this statute was interposed by the defendant and of the facts requisite to bring the defense within its terms as a supposed statute of limitations. The case was taken to the United States Supreme Court, which tribunal held the statute to be in violation of that clause of the United States Constitution which provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and that Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof." Under this clause of the United States Constitution it is held that such judgments have the same effect in another State when sued on as in the State where rendered, and that although a State may pass statutes of limitations reasonably prescribing a limit of time in which remedies by suit are available, and although such statutes apply as the law of the remedy and the *forum*, when reasonable, in suits on judgments of another State, yet that statutes amounting as this one does to a total denial of remedy, are void.³

¹ Fletcher v. Spaulding, 9 Minn. 64.

² Waters v. Barton, 1 Cold. 450.

³ Christmas v. Russell, 5 Wall. 290.
See *supra*, Actions on Foreign Judg-

III. STATUTES OF LIMITATION DO NOT APPLY TO SUITS BY STATE OR NATIONAL GOVERNMENTS.

Statutes of limitation of a State do not apply to the State itself, unless so expressed to be intended, or it clearly so appears to have been intended by the particular subject matter of limitation.¹ Nor do they apply to the United States,² for the legislation of a State can only apply to persons and things over which the State has jurisdiction.

IV. STATUTES LIMITING SUITS ON JUDGMENTS OF OTHER STATES OPERATE PROSPECTIVELY.

Statutes of a State limiting the time within which actions in her courts may be brought upon judgments of the courts of other States do not apply in their operation to judgments rendered before such statutes were enacted, unless they so express.³ And in calculating the time of limitation when applicable, it is to be reckoned in reference to the time of commencement of suit upon the judgment, and not in reference to the time of trial.⁴

V. IN SOME STATES A PREVIOUS BAR IN ANOTHER IS A GOOD PLEA.

In some of the States a statutory provision exists in reference to limitations of actions, that where, by the statute of a different State, wherein the defendant previously resided, the cause of action sued on was fully barred, and the contract or cause of action

ments, and *infra*, § 4. The States may prescribe the time within which actions may be brought, but as to existing causes they must allow a reasonable time. See *Hart v. Bostwick*, 14 Fla. 162; *Davidson v. Lawrence*, 49 Geo. 335; *Auld v. Butcher*, 2 Kan. 135; *Pereless v. Watertown*, 6 Biss. 79; *Kimbrow v. Bank of Fulton*, 49 Geo. 419.

¹ *Gibson v. Chouteau*, 13 Wall. 92, 99; *Lindsey v. Miller*, 6 Pet. 606. *Nullum tempus occurrit regi*. Angell on Limitations, § 34; Broom's Legal Maxims, *66; *Alton v. Illinois Trans. Co.*, 12 Ill. 38; *Crane v. Reeder*, 21

Mich. 24. But a State divests itself of this privilege when it engages in private business with an individual or corporation, and thus assumes the characteristics of a private person. *Governor v. Woodworth*, 63 Ill. 254.

² *Gibson v. Chouteau*, 13 Wall. 92, 99; *United States v. Hoar*, 2 Mas. 311; *People v. Gilbert*, 18 John. 223; *Swearingen v. U. S.* 11 Gill & J. 373.

³ *Murray v. Gibson*, 15 How. 421; *Boyd v. Barringer*, 23 Miss. 270; *Garrett v. Beaumont*, 24 Miss. 377.

⁴ *Murray v. Gibson*, 15 How. 421; *Moore v. Lobbin*, 26 Miss. 304.

had not arisen in the State where the suit is pending, that then the bar of the action in the other State is a good bar to the same in such suit.¹

Where the debt is not only barred, but actually extinguished by the law of the place which governs the performance of the contract, then to a suit in another State upon such contract the foreign statute may be successfully interposed; for it is here not a law governing only the remedy, but it destroys the right, and that being destroyed, the contract is no longer enforceable in any *forum* if the plea is interposed;² and particularly is this so where the property is in the possession of another, and the remedy has been cut off by lapse of time.³

Requisites of the Plea. To enable a defendant to obtain the benefit of this provision, his pleading must substantially show that the plaintiff's entire right of action had been fully barred by the statute of the other State while defendant there resided, and that the cause of action did not arise in the State where the suit is pending.⁴ But when the pleadings and evidence for the defense show, and the fact is satisfactorily established, that the cause of action has been fully barred by the laws of any country where the defendant has previously resided, then such bar amounts to the same defense in the court where the suit is pending as though it had arisen under the statute of the *forum*.⁵

VI. ABILITY OF THE CORPORATION OF ANOTHER STATE TO PLEAD THE STATUTE.

The ruling in *New York* is, that a foreign corporation, that is, a private corporation created in a different State, cannot successfully plead the statute of limitations of New York in defense of an action against it in the New York courts, although such foreign corporation be the lessee of a railroad in New York, and be operating the same therein, and have property and a managing

¹ *Gillett v. Hall*, 32 Iowa, 220; *Lloyd v. Perry*, 32 Iowa, 144; *Sloan v. Waugh*, 18 Iowa, 224; *Petchell v. Hopkins*, 19 Iowa, 531.

² *Lincoln v. Battelle*, 6 Wend. 475; *Brown v. Parker*, 28 Wis. 21; *Brent v. Chapman*, 5 Cr. 358; *Shelby v. Guy*,

11 Wheat. 361; *Foote's Private International Law*, 420 *et seq.*

³ *Ibid.*

⁴ *Gillett v. Hall*, 32 Iowa, 220.

⁵ *Lloyd v. Perry*, 32 Iowa, 144; *Petchell v. Hopkins*, 19 Iowa, 535; *Sloan v. Waugh*, 18 Iowa, 226; *Webster v. Rees*, 23 Iowa, 269.

agent residing and keeping an office within the State subject to process of the courts.¹

Of these rulings in New York, the Supreme Court of the United States, BRADLEY, J., say: "These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness, on general principles."² The ground upon which this ruling in the courts of New York is placed seems to be that a corporation is a resident of the State where created, and cannot emigrate or remove to another State, while the New York statute expressly excepts from the benefits of the limitations persons who are "out of the State when the cause of action shall accrue," and that the time of absence "shall not be taken as any part of the time limited for commencement" of the action; and that there is a legal impossibility for a corporation of another State to come within the State of New York.

HUNT, Justice, in the case cited, says: "Statutes of limitations are in their character arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens."³ Justice MILLER, in the same case, dissenting, says: "The liability to suit, where process can at all times be served, must, in the nature of things, be the test of the meaning of the statute. A different rule applied to an individual, because he is a citizen or resident of another State, is a violation at once of equal justice and of the rights conferred by the second section of the fourth Article of the Federal Constitution, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."⁴

In *Illinois* a different rule has been asserted by the Appellate Court. The doctrine here laid down is, that the statute runs where there is ability to obtain service, and that where a foreign corporation does business in the State having an office and agents therein, it may plead the statute.⁵

¹ *Thompson v. Tioga R. R. Co.*, 36 Barb. 79; *Olcutt v. Tioga R. R. Co.*, 20 N. Y. 210; *Rathbun v. Northern Cent. R. R. Co.*, 50 N. Y. 656; *Burroughs v. Bloomer*, 5 Denio, 532; *McCord v. Woodhull*, 27 How. Pr. 54; *Tioga R. R. Co. v. Blossburg & Corning R. R. Co.*, 20 Wall. 137.

² *Tioga R. R. Co. v. Blossburg &*

Corning R. R. Co., 20 Wall. 137, 149.

³ 20 Wall. p. 150.

⁴ *Tioga R. R. Co. v. Blossburg & Corning R. R. Co.*, 20 Wall. 152.

⁵ *Pennsylvania Company v. Sloan*, *Chicago Legal News*, Vol. X., p. 381. And also reported in 1 *Bradwell's Appel. Ct. Rep.* 364. See, also, *infra*, Chap. 26.

CHAPTER XVIII.

MARRIAGE AND DIVORCE — INTER-STATE VALIDITY THEREOF.

- I. INSTITUTION OF MARRIAGE. INTER-STATE VALIDITY OF MARRIAGES.
- II. DIVORCE. JURISDICTION TO GRANT THE SAME.
- III. INTER-STATE VALIDITY OF DIVORCES.
- IV. INTER-STATE CUSTODY OF CHILDREN. ENFORCEMENT OF ALIMONY.
- V. INTER-STATE EFFECT OF FORMER ADJUDICATION.

I. INSTITUTION OF MARRIAGE. INTER-STATE VALIDITY OF MARRIAGES.

Nature of the Marriage Contract. Marriage is a legal institution provided for by law for the good of the public and State, and the happiness and prosperity of individuals. It is not a mere contract, to be entered into and dissolved at the will of the parties, but depends in both respects upon the approbation and concurrence of the government and the law as declared and administered by the officially authorized authorities thereof.¹

The obligation of the marriage relation is recognized among all christian people, and a marriage valid and binding in the State or country where celebrated according to the law thereof, is, as a general principle, valid and binding everywhere else, whether in the same or in a foreign State or country. Such is the universal law,² subject, however to these exceptions, that it be not incestuous, polygamous, or repugnant to good morals, and the ordinary policy and sense in which it is regarded by civilized nations. But no State or people are bound to countenance or sustain in their midst, or to protect by law, practices or connections under the color of marriage which are inimical to the

¹ Cabell v. Cabell, 1 Met. (Ky.) 319, 327, 328; Roche v. Washington, 19 Ind. 53.

² 2 Kent, *92; Medway v. Need-

ham, 16 Mass. 157; Stevenson v. Gray, 17 B. Mon. 193; 1 Bishop on Marriage and Divorce, §§ 355, 370, and cases cited.

public or private morals of the people, or contrary to the provisions of domestic laws, however valid they may have been where entered into in countries authorizing the same.¹

The ruling in most, if not all of the American States is, that the marriage relation may be dissolved by legislative enactments in some and by judicial decree or judgment in other of the States, at the will of the sovereign power, expressed in the constitution and laws, with or without the concurring consent of the parties. The right to do so does not come within the inhibition of the constitution as to the impairing the obligation of contracts. It is regarded as an institution of State, and not a mere contract. Contracting to marry does not of itself create a marriage, but it only becomes such by the formal act of the law.² Hence it is, that the marriage capacity of persons is different, in a legal point of view, in different States, for, being a creature of the law, each sovereignty regulates it to suit its own views of the public good, declaring who are competent to enter into the marriage relation, and the manner of celebrating the same, and rendering it binding in law. But subject always to the one great leading principle of law, of a general nature, that if legal and valid in the State wherein it is entered into, the marriage is legal and valid in all others into which the parties come, if in its nature it be not opposed to the natural law, or good morals, or to the positive law and policy of such other States as hereinbefore stated.

So, likewise, if an alleged marriage be invalid in law where entered into, it is invalid everywhere else,³ not only upon the principle of general law as to the marriage *status*, but that in fact an *invalid* one is no marriage at all, either where entered into or elsewhere. By invalidity, however, is not to be understood mere *informality* or *irregularity* as to the method of entering into the same, but such a state of relation as the law of the place where entered into does not and will not recognize as creating the marriage state between the parties thereto.

¹ State v. Kennedy, 70 N. C. 251; Kinney v. Commonwealth, 6 The Reporter, 733, (Va. Sept. 1878.) But, see Medway v. Needham, 16 Mass. 157; Putnam v. Putnam, 8 Pick, 433; Stevenson v. Gray, 17 B. Mon. 193.

² Cabell v. Cabell, 1 Met. (Ky.) 319; Dartmouth College v. Woodward, 4

Wheat. 518; 2 Kent *108; Gaines v. Gaines, 9 B. Mon. 295, 308; Maguire v. Maguire, 7 Dana, 181; Berthelemy v. Johnson, 3 B. Mon. 90.

³ Greenwood v. Curtis, 6 Mass. 358; Bishop on Marriage and Divorce, vol. 1, § 390; Cheever v. Wilson, 9 Wall. 108.

II. DIVORCE. JURISDICTION TO GRANT THE SAME.

In Ecclesiastical Courts. In the mother country jurisdiction in matters of divorce was vested exclusively in the ecclesiastical courts; the courts of common law had no authority upon the subject.¹

By Statute in Common Law and Chancery Courts. It followed from this, that there being no ecclesiastical courts in the American colonies, or subsequently in the States, there was no jurisdiction whatever here to grant divorces, except as conferred by statute upon the common law, or chancery courts, of the country.² Until so conferred upon the judiciary the power was in the legislative departments of the local governments alone;³ but when conferred upon the courts they took it, so far as consistent with the nature of our institutions, to be exercised in accordance with the rules and principles of the ecclesiastical courts of the mother country in similar cases.⁴

Lex Loci Contractus. The *lex loci contractus* is ordinarily the legal test of validity of marriage, legitimacy and divorce, when brought in question in other States, but the courts of such other States will not recognize or be governed in their decisions by such laws, if in their nature they encourage immorality, or are in violation of the general moral tone or policy of civilized States, or outrage the policy or conscience of the community thus called on to enforce them.⁵

Residence in Cases of Divorce. Residence of the applicant, in good faith, within the State where the application is made, is necessary, to enable a court to take jurisdiction of an application for a divorce, and to dispose of the same by granting the applicant a divorce, if cause is found therefor.⁶ And where the hus-

¹ *Le Barron v. Le Barron*, 35 Vt. 365; *Brinkley v. Brinkley*, 50 N. Y. 184, 190; *Burtis v. Burtis*, Hopk. Ch. 557.

² *Le Barron v. Le Barron*, 35 Vt. 365; *Brinkley v. Brinkley*, 50 N. Y. 184, 190.

³ *Le Barron v. Le Barron*, 35 Vt. 365; *Starr v. Pease*, 8 Conn. 541; *Cooley's Const. Lim.* *110 *et seq.*

⁴ *Le Barron v. Le Barron*, 35 Vt. 365; *Brinkley v. Brinkley*, 50 N. Y. 184, 190; *Griffin v. Griffin*, 47 N. Y. 134.

⁵ *Eubanks v. Banks*, 34 Geo. 407.

⁶ *Wright v. Wright*, 24 Mich. 130; *Manley v. Manley*, 3 Pinn. 390; *Shafer v. Bushnell*, 24 Wis. 372; *Hubbell v. Hubbell*, 3 Wis. 662; *Gleason v. Gleason*, 4 Wis. 64; *Hanover v. Turner*, 14

band is a resident of one State, and the wife is resident in another, the courts of each State have jurisdiction to grant a divorce, at the instance of the party so residing therein; and if a divorce be granted in one of these States to the party so residing therein by proceedings *in rem*, that does not preclude the courts of the other State from granting a divorce to the party residing in such other State; and the rule is the same, whether the decree was regularly or irregularly obtained in the case of the one first obtaining it.¹ In such cases the courts of both States have power to dissolve the marriage relations of the parties, so far as regards the parties residing in their respective territorial limits, and upon such terms in respect to such resident party as are permitted by the laws thereof; and this, too, notwithstanding the fact that a divorce has been decreed to the other party, and upon different terms, in the State where such other party resides, or resided at the time thereof.² This power of the courts, where the applicant resides, is not dependent upon the residence of the defendant in the same State or jurisdiction, but exists though the defendant never resided in the State. The court acts upon the contract, and dissolves that, so far at least as regards the party making the application, over whom and the contract, as personal to such party, the court has actual jurisdiction; nor is it necessary, under the Wisconsin statute, that the cause relied upon for divorce shall have accrued within that State.³

Void Decree of Divorce. But a decree of divorce in a court of a State in which neither party is domiciled, and in a suit in

Mass. 227; Chase *v.* Chase, 6 Gray, 157; Vischer *v.* Vischer, 12 Barb. 640; McGiffert *v.* McGiffert, 31 Barb. 69; Wilcox *v.* Wilcox, 10 Ind. 436; Ditson *v.* Ditson, 4 R. I. 87. This case is a leading one on this subject. The point is very exhaustively discussed, and the conclusion arrived at is, that the jurisdiction of a court in divorce depends not upon the place of the marriage, or of the breach of its duties; but marriage, being a relation involving the *status* of a party to it, can be dissolved by the court having jurisdiction of the petitioning party alone, as a citizen of the State. See,

also, State *v.* Armington, 17 Alb. Law Jour. 451; Cooley Const. Lim. 400.

¹ Wright *v.* Wright, 24 Mich. 180; Manley *v.* Manley, 3 Pinn. 390.

² Wright *v.* Wright, 24 Mich. 180; Holmes *v.* Holmes, 4 Lans. 388; Batchelder *v.* Batchelder, 14 N. H. 380; Ditson *v.* Ditson, 4 R. I. 87; Forrest *v.* Forrest, 6 Duer, 103; Bishop *v.* Bishop, 30 Penn. St. 412; Hanberry *v.* Hanberry, 29 Ala. 719; Kruse *v.* Kruse, 25 Mo. 68; Kashaw *v.* Kashaw, 3 Cal. 312.

³ Gleason *v.* Gleason, 4 Wis. 64; Manley *v.* Manley, 3 Pinn. 390; Hubbell *v.* Hubbell, 3 Wis. 662.

which there was no service on the defendant, is simply void for want of jurisdiction.¹

Rule of Wife's Domicile when Living Separate from her Husband. The rule that the *domicile* of the wife is construed to be the same as that of her husband is not recognized in divorce cases as law, when the parties, for cause, are living separate and in different States.² In such case, it has been held that a wife residing in a different State than that in which is the residence of the husband, cannot sustain a proceeding for divorce in the courts of the State wherein the husband resides.³ But, so far as relates to capacity, dependant upon residence, in proceedings for divorce, a wife may acquire a different residence and domicile than that of her husband, and may there maintain proceedings for divorce.⁴

III. INTER-STATE VALIDITY OF DIVORCE.

Valid where Rendered, Valid Elsewhere. A decree of divorce, valid and effectual, according to the laws of the State in whose courts it is rendered, if jurisdiction attached, is valid and effectual in every other State where it comes in question, properly evidenced under the laws and Constitution of the United States. It is then entitled to the same effect and has the same force which pertains to it in the State where it is rendered.⁵

Divorce without Residence of either Party is Void. A decree of divorce by the court of a State wherein neither of the parties to the decree permanently resided at the time of making the same, or resided at the inception of the cause for which there is a commencement of proceedings, is absolutely void for want of jurisdiction, notwithstanding it be stated in the record that the

¹ Hoffman v. Hoffman, 46 N. Y. 30; Elder v. Reel, 62 Penn. St. 308; People v. Darrell, 25 Mich. 247.

² Dutcher v. Dutcher, 39 Wis. 651; Ditson v. Ditson, 4 R. I. 87; Harteau v. Harteau, 14 Pick. 181, Harding v. Aiden, 9 Greenl. 140; Hopkins v. Hopkins, 35 N. H. 474; Payson v. Payson, 34 N. H. 518; Yates v. Yates, 13 N. J. Eq. 280; Schonwald v. Schonwald, 2 Jones Eq. 367; Jenness v. Jenness, 24 Ind. 355; Phillips v. Phillips, 22 Wis. 256; Shafer v. Bushnell, 24 Wis. 372; Craven v. Craven, 27 Wis.

418; Cheever v. Wilson, 9 Wall. 108; Hanberry v. Hanberry, 29 Ala. 719; Tolen v. Tolen, 2 Blackf. 407.

³ Dutcher v. Dutcher, 39 Wis. 651; This was owing to the statute of Wisconsin, which provides that the plaintiff in a divorce suit must have his domicile there.

⁴ Craven v. Craven, 27 Wis. 418, and cases cited in note 1 *supra*.

⁵ Cheever v. Wilson, 9 Wall. 108, 123; Slade v. Slade, 58 Maine, 157; 2 Bishop on Marriage and Divorce, § 754 *et seq.*

plaintiff or complainant had resided in the State for a year next preceding the commencement of the suit.¹

Want of Residence and Fraud open to Inter-State Inquiry. The law requiring full faith and credit to be given in the courts of each State to the records and judicial proceedings of the courts of other States does not prevent an inquiry into the jurisdiction of a court rendering a judgment or decree, when such judgment or decree emanates from the court of another State. Nor is an investigation precluded thereby as to such judgments or decrees having been obtained by fraud. But when suit is brought on either in a different State than where rendered, both the one and the other may be collaterally inquired into, and if it turn out that jurisdiction was wanting, or that the judgment or decree was obtained by fraud, they will be treated as a nullity.² In Massachusetts, it is not only held that marriages celebrated in other States, which are there valid in law, are also valid in Massachusetts, but prior to the passage of the provision of the Revised Statutes, Chapter 75, Sec. 6, on the subject, it was held that such marriages were valid in Massachusetts, although the parties went into another State and were there married, on purpose to evade the law of Massachusetts.³ Such marriages, however, are, by the statute, declared void, in case a party had previously been divorced for being guilty of adultery.⁴ And so in said State it is held that a person may lawfully marry in that State who has been divorced from a former marriage in another State for a cause not recognized as sufficient in Massachusetts, and whose companion by the former marriage is still living, if the divorce in the other State be valid where it was obtained.⁵ That such divorce, being valid where obtained, must be regarded as valid everywhere, if decreed upon proper jurisdiction of the case; and that the stat-

¹ Kerr v. Kerr, 41 N. Y. (2 Hand.) 272; Hoffman v. Hoffman, 46 N. Y. 30; 2 Bishop on Marriage and Divorce, § 144 *et seq.* See, also, the very late case of State v. Armington, 17 Alb. Law Jour. 451; Ditson v. Ditson, 4 R. I. 93; Hanover v. Turner, 14 Mass. 227; Cooley's Const. Lim. *400.

² Kerr v. Kerr, 41 N. Y. (2 Hand.) 272; Berdan v. Fitch, 15 John. 121; Shumway v. Stillman, 4 Cow. 292;

Andrews v. Montgomery, 19 John. 162; Whitcomb v. Whitcomb, 46 Iowa, 437; Rush v. Rush, 46 Iowa, 648; 2 Bishop on Marriage and Divorce, § 753 *et seq.*

³ West Cambridge v. Lexington, 1 Pick. 506; Putnam v. Putnam, 8 Pick. 433; Sutton v. Warren, 10 Met. 451.

⁴ Commonwealth v. Hunt, 4 Cush. 49.

⁵ Clark v. Clark, 8 Cush. 385.

ute of Massachusetts disabling a party under certain circumstances not necessary to be here referred to, does not apply to such a case.¹

IV. INTER-STATE CUSTODY OF CHILDREN. ENFORCEMENT OF ALIMONY.

Decree for Custody of Children. A decree of divorce of a State court of general jurisdiction granting to the party who obtains the same the exclusive custody and control of an infant or minor child of the parties, and over which child the court had actual jurisdiction by its person then being within the jurisdiction and power of the court, will, while it remains in full force, be respected and regarded as binding on the parties, and as conclusive in the courts of all other of the States wherein its validity is brought in question, unless impeached in some way recognized by the law, and this, too, although obtained in a proceeding *in rem*.²

Action at Law will not lie on Decree for Alimony. Although, as we have seen, an action at law will lie ordinarily on a decree in chancery, for a sum of money certain, of a court of another State, yet it must be a final decree, such as leaves nothing more to be done or liable to be done to alter the *status* thereof, and, therefore, an action at law cannot be sustained on a decree for alimony made in a case of divorce, for such a decree is in its nature temporary and may be increased as necessity may require and the ability of the husband permit, or it may be diminished or dissolved. It cannot be regarded as a decree final and absolute for a sum certain, and cannot have the force or effect of a judgment at law, but is enforceable in chancery only.³

If Defendant Removes to Another State a Bill of Equity Lies against him on Decree of Alimony. But when the defendant husband in such a decree removes to another State so as to place

¹ Clark v. Clark, 8 Cush. 385.

² Wakefield v. Ives, 35 Iowa, 238. But see Thorndice v. Rice, 24 Am. Law Reporter, 19, 20, where a Massachusetts judge decided on a question of *habeas corpus*, that the decree of a court of another State awarding the custody of the child to its father was

not a final decree which would be binding in Massachusetts. See, also, 2 Bishop on Marriage and Divorce, § 204.

³ Barber v. Barber, 2 Pinn. 297, 299, 300; Elliott v. Ray, 2 Blackf. 31. See Harrison v. Harrison, 20 Ala. 629; Barber v. Barber, 21 How. 582.

himself beyond the jurisdiction of the court where the decree is made, and thereby render its enforcement impracticable, a bill in equity lies in the State of the husband's residence upon ordinary principles of equity to enforce the same.

When it Lies in United States Court. And in such case, the parties having thus become citizens of different States, such bill for equitable relief, if the sum claimed brings the case within the jurisdiction of the court, will be sustained in the circuit court of the United States upon general principles of affording relief in equity where there is right and yet no remedy at law; but such United States court takes the jurisdiction upon such general principles only and not as a matter of jurisdiction in cases of divorce, which latter the United States courts do not entertain.¹ For although courts of the United States have no jurisdiction upon the subject of divorce or for allowance of alimony, either as an original chancery proceeding or as incident thereto, yet when a divorce has been decreed by a State court of competent jurisdiction, with alimony to the wife, then if such alimony be not paid, and the amount thereof and citizenship of the parties determinable by their respective domiciles be such as in these respects to confer jurisdiction in the circuit court of the United States, and the party liable for the same has placed himself beyond the jurisdiction of the court which decreed the alimony and divorce, so as to render it impracticable for that court to cause its process to act upon his person to enforce payment under the decree, and has no property within the jurisdiction whereof it may be made, then as between the parties, the circuit court has jurisdiction in equity to enforce the decree at the suit of the divorced wife in whatever district the defendant may be found, if at the time they be citizens of different States.²

And where such divorce was a divorce *a vinculo*, and the husband thus departing into a different State and residing there, applied for and got a divorce from the same wife *a mensa et thoro*, such subsequent divorce does not in any manner discharge him from liability to enforcement of the decree of alimony rendered against him in the first suit for divorce, and it is no defense to a suit on such decree in the State of his subsequent residence or elsewhere when sued thereon. Such judgment or

¹ Barber v. Barber, 21 How. 592.

² Ibid.

decree rendered in a State court, with jurisdiction, has the same binding force in courts of any other State of the United States that it has in the State where originally rendered. As to the domicile of the wife after such divorce, the American rule is that when parties are already living under a judicial separation, her domicile no longer follows his. So that a wife so divorced may thereafter establish a domicile of her own.¹

Prosecution for Bigamy. To sustain a prosecution for bigamy in one State for cohabitation therein with the alleged second wife of the party, where both the marriages are shown to have taken place in another State, it must be alleged in the indictment that the second marriage was unlawful in such other State at the time it was entered into, for if lawful and valid where it occurred it will not sustain a prosecution for bigamy.²

V. INTER-STATE EFFECT OF FORMER ADJUDICATION.

Former adjudication. A former adjudication in another State must, in order to be a bar, be an adjudication of the very point or subject matter involved in the suit wherein it is pleaded, and must be of the principal question and final upon the merits: a merely interlocutory judgment, order or decree, in reference thereto, will not operate as a bar to a subsequent action or suit, having for its object the principal or main purpose of that in which such interlocutory proceeding occurred.³ The mere denial of such interlocutory order, judgment or decree, in a similar action or suit in another State, as, for instance, the granting or denial of alimony, will not be a bar to the granting thereof in another suit or action in another State, if to such latter suit or action, the principal proceedings in such prior case, and the decision therein be not such as to bar and preclude the plaintiff in the subsequent suit or action, and the right to maintain the same.⁴

¹ Barber v. Barber, 21 How. 532.

² State v. Palmer, 18 Vt. 570.

³ Brinkley v. Brinkley, 56 N. Y. 134.

⁴ Brinkley v. Brinkley, 50 N. Y. 184, 202.

CHAPTER XIX.

INTER-STATE LEGAL STATUS OF PERSONS.

- I. RESIDENCE AND DOMICILE DEFINED AND DISTINGUISHED.
- II. DOMICILE OF INFANTS, MINORS, AND ADULTS.
- III. CITIZENSHIP — RIGHTS OF.
- IV. LEGAL CAPACITY TO ACT.

I. RESIDENCE AND DOMICILE DEFINED AND DISTINGUISHED.

Residence. A mere residence is a place at which a person resides for a fixed or limited time, without intention of permanency of location. The limitation of time may be fixed by a definite period or term, or by expected future occurrences or circumstances, but nevertheless, accompanied by, as well as begun with, a fixed expectation of removal in the future, and not with the intention of remaining indefinitely.¹

A person cannot have a residence in two different States or countries at the same time.² But a person may have his domicile in one State, and at the same time a residence in another; the one in his permanent dwelling place, and the other his place of temporary abiding.³ The difference depends upon his intention,⁴ and that intention may be shown by his open declarations and acts, or in the absence of such, then by satisfactory circumstances, if such exist.⁵ If one so resort to two such places, under circumstances, and for times so indefinite as to render it otherwise not apparent which of the two is his domicile, then he

¹ Brent v. Armfield, 4 Cr. C. C. 579;
² Kent's Com. *430, note f.

² Ibid.

³ Haggart v. Morgan, 5 N. Y. 422,
 423; *In re* Thompson, 1 Wend. 45;
 Frost v. Brisbin, 19 Wend. 11; Love
 v. Cherry, 24 Iowa, 204, 209.

⁴ Prentiss v. Barton, 1 Brock. C. C.
 389; Butler v. Farnsworth, 4 Wash. C.

C. 101; Case v. Clarke, 5 Mas. 70;
 Hylton v. Brown, 1 Wash. C. C. 298.

⁵ Tobin v. Walkinshaw, 1 McAllister,
 186; Burnham v. Rangeley, 1
 Wood. & M. 7; Butler v. Farnsworth,
 4 Wash. C. C. 101; State v. Groome,
 10 Iowa, 308; Love v. Cherry, 24 Iowa,
 204.

has his own right of election in law to determine which of the two is his domicile.¹

In some of the States the ruling is, that the term *residence*, and *permanent residence*, or *domicile*, virtually are intended as the same thing, in reference to the necessity of a residence in judicial proceedings for a divorce, and in regard to the right to vote, as said terms are used in the laws of the States. That it must be such a residence as does not contemplate a removal, or as in the mind of the person is permanent, and not resorted to temporarily for a particular purpose. That is, that as used in the statute, it does not mean a mere abiding in the State to enable a party to bring himself within the mere letter of the term, or more circumscribed meaning thereof, as contradistinguished from *domicile*, but that in connection with proceedings for divorce, and right of suffrage, it means an abiding without intention to again depart from the State to reside elsewhere. And in this sense it is no doubt meant in proceedings of this description.²

Domicile. By the term *domicile* is meant the place whereat a person makes his residence with intent to indefinitely there reside, without any expectation of removing in the future therefrom. Every domicile is necessarily a residence; but a residence is not necessarily a domicile. If in the mind of the person there abiding it is merely a temporary abiding place, for a given purpose and definite time, with expectation to then remove therefrom, then, although while there the party in the more broad acceptation of the term, may be said to there reside, yet not being by him regarded as his settled or permanent home, it is not in the general sense thereof or legal meaning of the term, his *domicile*.³ The latter may be somewhere else; this very principle was acted upon by the Supreme Court of Iowa, in *Love v. Cherry*, wherein a party was held to have had a domicile in Iowa, during several years' residence in Texas.⁴

In Louisiana, the true principle as to the character of the residence essential to constitute a *domicile* of an adult, is laid down by Justice VOORHIES as follows: "The act of residence does not

¹ Burnham v. Rangeley, 1 Wood. & M. 7.

² Hinds v. Hinds, 1 Iowa, 36; State v. Minnick, 15 Iowa, 123.

³ Love v. Cherry, 24 Iowa, 204, 209; 2 Kent's Com. *430, note f.

⁴ 24 Iowa, 204, 209.

alone constitute the *domicile* of the party, but it is the fact of residence coupled with the intention of remaining, which constitutes it."¹

Domicile Not Acquired by Coercion. Domicile is not acquired by constraint. If a person is forced from the country of his domicile and compelled to remain involuntarily in another, such constrained and enforced residence, no matter how long, will not make a change in his national domicile; on the contrary, his original citizenship and domicile remain to him with the rights thereof.² To amount to an abandonment of *domicile* and country there must be the *concurrence* of *act* and *will*.³ The original domicile remains until a new one is attained to.⁴

II. DOMICILES OF INFANTS, MINORS AND ADULTS.

Infants and Minors. The domicile of an infant of tender years, or during nurture, is that place which is the domicile of its mother,⁵ if the latter have charge of it. The domicile of the mother is that which is the domicile of the husband, if she has a husband and they are not permanently separated.⁶ If permanently separated, then she may acquire a domicile, if without one, for herself.⁷ The domicile of the minor children is that which is the domicile of the parents.⁸ If the latter be changed theirs is changed accordingly. The domicile of the parents is that place where they intentionally fix their residence with the expectation and purpose of there permanently dwelling.⁹

A domicile once fixed remains such until another domicile be obtained, unless parted with and abandoned.¹⁰ If the husband and wife have acquired a domicile and the husband die, then the domicile still continues to be that of the wife, and of the minor children, if any, until a different one is legally acquired.¹¹

Marital Right. The marital rights of husband and wife who

¹ McKowen v. McGuire, 15 La. Ann. 637.

² Hardy v. De Leon, 5 Tex. 211.

³ Ibid.

⁴ Ibid. 236; 2 Kent, *430, (note), Story's Conf. of Laws, §§ 44, 47.

⁵ Doe v. Litherberry, 4 McL. 442; Wheeler v. Burrow, 18 Ind. 14.

⁶ Davis v. Davis, 30 Ill. 180; Burnham v. Rangeley, 1 Wood. & M. 7.

⁷ Jenness v. Jenness, 24 Ind. 355.

⁸ Doe v. Litherberry, 4 McL. 442; Wheeler v. Burrow, 18 Ind. 14; Wharton's Conf. of Laws, § 41; Story's Conf. of Laws, §§ 45, 46; Schouler's Domestic Relations, *312, *412.

⁹ *Supra*, Domicile.

¹⁰ Ibid.

¹¹ Pennsylvania v. Ravenel, 21 How. 103.

marry in a State in which neither of them resides are regulated by the laws of the place of the husband's domicile.¹

Infants Born Abroad. The domicile of an infant born abroad is that which is at the time thereof the domicile of the parents, and so continues until their domicile is changed.² And though by the rule laid down in *Graham v. Monsergh*,³ a bastard born in another State of a mother who has no domicile in Vermont at the time, cannot be affiliated therein under the statute concerning bastardy, yet if at the time of the birth of a bastard the mother be *bona fide* a resident of the State so as to have a domicile therein, but be temporarily absent in another State and the child there be born, then the remedy is under the statute of Vermont, and will lie in the courts of Vermont.⁴ And if the evidence of domicile is doubtful, yet tends to show a residence in the State where the proceedings are had, then the same is to go to the jury for their decision as a question of fact.⁵

Domicile as Giving Benefit of Common Schools. The domicile of minor children being that which is their parents', it results that minor children of parents resident and fully domiciled in one State have no right to the benefits of the common schools of other States, and that parents cannot gain for them such a domicile as will entitle them to the privileges of such schools by merely sending them to reside with friends in such other State or States for the purpose of admission to the common schools thereof.⁶

III. CITIZENSHIP.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁷ Such, in the language of the constitution itself, is given as the true definition of actual citizenship. "The citizens of each State are entitled to all the privileges and immunities of citizens in the several States."⁸ There is recognized in the courts a constructive citi-

¹ *Land v. Land*, 14 Sm. & M. 99.

² *Warren v. Hofer*, 13 Ind. 167; *Keistand v. Kuns*, 8 Blackf. 345; *Wheeler v. Burrow*, 18 Ind. 14.

³ 22 Vt. 543.

⁴ *Eggleston v. Battles*, 26 Vt. 548.

⁵ *Ibid.*

⁶ *Wheeler v. Burrow*, 18 Ind. 14.

⁷ Art. 14, § 1, of Amendments to the Const. United States.

⁸ Art. 4, § 2, Const. United States.

zenship which is satisfied by proof of actual permanent residence in a State in proceedings to remove suits from State to National courts, to the effect that the term *citizen*, as used in the act of Congress of September 24, 1789, in relation to the jurisdiction of the United States Circuit Court, and extending the same to a suit between a citizen of the State wherein the suit is brought and a citizen of another State, is construed to mean no more in that connection than that the parties shall be *permanently resident*, or *domiciled*, in their respective States. It is not necessary to jurisdiction in such cases that they be citizens in a *political* sense; actual residence is all that is required.¹ It is also held that the designation includes private corporations as well as natural persons.²

IV. LEGAL CAPACITY TO ACT.

In Personal Matters. It is a principle of *universal* law, or of what is sometimes regarded as the *jus gentium*, that the legal capacity of persons to act and to make contracts for themselves depends upon the law of the State or country where the transaction takes place, as to all personal matters, whether the subject matter contracted about or involved be *within* the State or *without* the State wherein the transaction occurs.³

As to Real Property. But in reference to contracts about the sale and conveyance of land such capacity depends upon the laws of the State wherein the land is situated.⁴ This is the general ruling in America as to the law upon these subjects in whatsoever court the question may arise, domestic or foreign. This

¹ Den v. Sharp, 4 Wash. C. C. 609; Evans v. Davenport, 4 McL. 574; Prentiss v. Barton, 1 Brock. 389; Read v. Bertrand, 4 Wash. C. C. 514; Suelton v. Tiffin, 6 How. 163.

² Louisville, Cin. & Charl. R. R. Co. v. Letson, 2 How. 497; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286; Marshall v. Balt & Ohio R. R. Co., 16 How. 314; French v. Lafayette Ins. Co., 5 McL. 461; New York & Erie R. R. Co. v. Shepard, 5 McL. 455.

³ Huey's Appeal, 1 Grant's Cases, 51; Story's Conflict of Laws, §§ 51,

363-373; Partee v. Silliman, 44 Miss. 72; 2 Kent's Com. *429.

⁴ Huey's Appeal, *supra*; Kling v. Sejour, 4 La. Ann. 128; Clopton v. Booker, 27 Ark. 482; Barnum v. Barnum, 42 Md. 251; White v. Howard, 46 N. Y. 144; Pell v. Miller, 11 Ohio St. 331; McCormick v. Sullivan, 10 Wheat. 102; Kerr v. Moon, 9 Wheat. 565; Hughes v. Hughes, 14 La. Ann. 85; 2 Kent's Com. *429 and 4 Ibid. *441; Story's Conflict of Laws, § 424 *et seq.*

rule applies to questions of infancy, coverture, majority and of legal capacity generally.¹ Thus persons having attained to their majority or being of contracting age by the laws of the State wherein they contract, may do so in reference to personal interests and matters wherever such interests and property may be, whether in one State or any other. But if the transaction be for the selling or conveyance of lands, then the capacity to sell or convey must be such as is required by the law of the State wherein the lands lie, and this too whether the contract be made or executed in the State of the vendor's domicile or in the State where the lands are situated, or in an entirely different State from either. In other words, the law of the State where the lands lie governs as to the age of contracting and other capacity of persons selling or conveying the same; but the law of the place of contracting, as above stated, governs as to capacity to contract in selling or conveying personal property, and in all contracts of a personal nature.² The mere question of *majority* and freedom from parental control is regulated by the law of the domicile. At common law it was as to both sexes at the age of twenty-one. By the civil law, as in force in Louisiana at the time of its cession to the United States, persons attained their majority at the age of twenty-five. But by the act of the Legislature of Orleans Territory of the 20th of May, 1806, the law in this respect was changed, to take effect in two years next from that date. By this change the age of twenty-one, as at common law, was fixed as the time of attaining to majority.³

By the same act it was provided that persons then in said Territory who had come therein from any other country and persons thereafter coming therein from another country, of twenty-one years of age, and who had attained to their majority in the country from whence they came, according to the law thereof, should continue to enjoy the rights of majority in the Territory.⁴

Capacity to Marry. Capacity of persons to *marry* depends, as a general principle, upon the law of the country or State wherein the marriage is celebrated, and not upon the law of the

¹ Huey's Appeal, 1 Grant's Cases, 51; Story's Conflict of Laws, §§ 51, 65; Barnum v. Barnum, 42 Md. 251; White v. Howard, 46 N. Y. 144.

² See cases cited above.

³ 3 Martin's Dig. § 1.

⁴ 3 Martin's Dig. § 2.

domicile, if the marriage take place in a different State or sovereignty.¹ There are exceptions to this rule of cases, involving *usages*, laws or customs, which *outrage* the moral senses and principles of the advanced civilization of the age, as for instance polygamous and incestuous marriages, though tolerated where entered into, will not be regarded as legal in communities where such practices are inhibited by law.² But where there is a mere inhibition or incapacity to marry in one State and marriage is had in another, it is otherwise, as where a citizen of New York, who labored under disability to marry again during the lifetime of a former wife from whom there had been a divorce, married again in New Jersey, himself and the person whom he so married in New Jersey both residing at the time in New York and continued thereafter to reside in New York until his death, the widow was adjudged entitled to dower as his widow by lawful marriage, she having no knowledge at her marriage of the existing inhibition in law to her husband's marriage in New York, and it not appearing that they went to New Jersey to be married in order to evade the effect of the law of New York.³ But where parties are incapacitated by the law of their domicile from marrying, and with the intent to avoid such law escape into another jurisdiction where their marriage is valid and are there married, and then return to the place of their domicile, such a marriage will be considered as invalid as being in contravention of the law by which the parties were governed.⁴

Plea of Infancy. When the plea of infancy is set up in defense of a suit on a contract made in a different State than the one wherein the suit is pending, then the law of the place of making the contract is the rule of decision;⁵ and if there be no evidence before the court as to what that law is, then the common law on the subject is presumed to be the law. So that proof

¹ Pondsford v. Johnson, 2 Blatchf. 51; 2 Kent's Com. *459 and notes; Story's Conflict of Laws, § 101 *et seq.* See *supra*, Chap. XVIII.

² Pondsford v. Johnson, 2 Blatchf. 51; 2 Kent's Com. *459.

³ Pondsford v. Johnson, 2 Blatchf. 51; State v. Kennedy, 76 N. C. 251; Commonwealth v. Kinney, 6 The Reporter, 733; Medway v. Needham, 16

Mass. 157; Putnam v. Putnam, 8 Pick. 433; Stevenson v. Gray, 17 B. Mon. 193.

⁴ Le Breton v. Nouchet, 3 Martin, 60; 2 Kent's Com. *459 and notes.

⁵ Holmes v. Mallett, Morris, (Iowa,) 82; and, *ante*, Inter-State Law of Contracts, Chap. VIII.; Huey's Appeal, 1 Grant's Cases, 51.

of an age, at the time of making the contract, which fixes infancy on the defendant within the terms of the common law, dispenses with the necessity of evidence to prove the law of the place of the contract in support of the plea.¹

¹ *Holmes v. Mallett, Morris, (Iowa), 51*

CHAPTER XX.

LEGAL STATUS AND JURISDICTION OF PERSONAL PROPERTY AND
PERSONAL INTERESTS.

- I. THE LEGAL STATUS FOLLOWS THE OWNER.
- II. EXCEPTIONS TO THE RULE.
- III. SALES AND TRANSFERS VALID WHERE MADE ARE VALID ELSEWHERE.
- IV. DISTRIBUTION OF A DECEASED PERSON'S MOVABLES.
- V. LOCALITY AND SITUS OF MONEY OBLIGATIONS AND DEBTS.
- VI. MORTGAGES OF PERSONAL PROPERTY.
- VII. SUBSCRIPTIONS TO CAPITAL STOCK.
- VIII. VOLUNTARY ASSIGNMENTS.
- IX. WHEN PERSONAL PROPERTY IS TAXABLE.

I. THE LEGAL STATUS FOLLOWS THE OWNER.

No fixed *Situs*. In the language of RANNEY, J., "personal property has no fixed *situs*." It "adheres, in contemplation of law, to the person of the owner, and is disposed of in almost every respect, whether of transfers *inter-vivos*, testamentary dispositions, or successions by the law of his domicile."¹ This is a universal rule of law among all civilized people, and has become a sort of common law of the world. So thoroughly is it a part of the *jus gentium* or law of nations, that instead of the local law of place giving way to it as matter of *comity*, it is itself, in virtue of its universality, a part of the local law in every civilized community.² In the language of the court, in *Despard v. Churchill*,³ "personal property is subject to the law which governs the person of its owner,

¹ *Swearingen v. Morris*, 14 Ohio St. 424; *Guillander v. Howell*, 35 N. Y. 657; *Mills v. Thornton*, 26 Ill. 300; *Ackerman v. Cross*, 54 N. Y. 29; *Despard v. Churchill*, 53 N. Y. 192; *Harvey v. Richards*, 1 Mas. 381; *Kelly v. Crapo*, 45 N. Y. 86; *Partee v. Silliman*, 44 Miss. 272.

² *Swearingen v. Morris*, 14 Ohio St.

424, 429; *Sill v. Worswick*, 1 H. Black. 665, 690; *Holmes v. Remsen*, 4 John. Ch. 460; *Harvey v. Richards*, 1 Mas. 381; *Moultrie v. Hunt*, 23 N. Y. 394; *DeCouche v. Savetier*, 3 John. Ch. 190; *DeGobry v. DeLaistre*, 2 Har. & John. 193; *Shultz v. Pulver*, 3 Paige, 182; *Mills v. Thornton*, 26 Ill. 300.

³ 53 N. Y. 192.

as to its transmission by last will and testament; and this principal, though arising in the exercise of international *comity*, has become *obligatory* as a rule of decision by the courts." As is said by Lord LOUGHBOROUGH: "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no *visible* locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person. The owner, in any country, may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."¹ And RANNEY, J., in *Swearingen v. Morris*,² above cited, says: "Indeed, so universally has it been treated as a part of the *jus gentium*, and thus incorporated into the municipal law of every country, that C. J. ABBOTT declared it not correct to say, that the law of England gives way to the law of the foreign country; but that it is a part of the law of England that personal property should be distributed according to the *jus domicilii*." Justice RANNEY adds: "The doctrine has been universally acted upon in this country, and it will be readily seen that it could nowhere be applied with greater benefit or less inconvenience than between the States of the American Union."

II. EXCEPTIONS TO THE RULE.

Local Liabilities. To this general rule of the law there are these exceptions: That visible or tangible personal property situated in another State than that of the owner's *domicile* is there first liable, by paramount right of the local government, and of creditors of the owner therein resident, to be distributed in satisfaction of all just demands against the same or against the owner thereof, which the local government or its citizens or subjects³ are

¹ *Sill v. Worswick*, 1 H. Black. 690.

² 14 Ohio St. 424, 429.

³ *Swearingen v. Morris*, 14 Ohio St. 424, 429; *Guillander v. Howell*, 35 N. Y. 657. And if claimed under a

transfer of the owner, as, for instance, an assignment with preferences, for benefit of creditors, then if such transfer be prohibited by the law of the State where the property is situ-

entitled to, and is there liable, also, to taxation, if in a different sovereignty.¹

A sale or transfer by the owner, valid where the owner lives, is valid in the State where the property is, not only as between the parties thereto, but also as against all others, except citizens or subjects of the State wherein the property is, having prior just claims against the owner, to which it may be subject, or as against the claims of the State itself. The right of satisfaction of these out of the property is paramount.² So if the owner die intestate, the property is to be distributed in the manner and to those to whom it descends by the law of his *domicile* at the time of his death, but being first subject to such local claims of persons or the State as exist where it is situated. The residue, after satisfying these, is to be thus distributed by the local court, or turned over to the administrator of the domicile of the deceased to be then distributed.³ And in like manner a devise or testamentary disposition of the personal property, valid by the law of the *domicile* of the testator, is (subject to the liabilities and exceptions aforesaid,) valid where the property is situated in such other jurisdiction, and will be so distributed, either by the court of the country where situated, or else the residue, after satisfaction of liability, will be turned over to the administrator or executor of the deceased, in the courts of the country of his late *domicile*.⁴ But this rule of law, though general, as before stated, is nevertheless subject to alteration or legislative control of the several States, they being sovereign in their own domestic affairs; and therefore, where a different rule is by statute enacted in a State, then such local statutory law of such State will govern in regard to personal property therein situated, although the property be owned by a resident or citizen of another State.⁵ So, if

ated, it will not be enforced in the courts of such State as against creditors of the assignor. *Ibid.*; *Despard v. Churchill*, 53 N. Y. 192, 199.

¹ See *Post* Sec. IX. of this chapter.

² *Swearingen v. Morris*, 14 Ohio St. 424; *Parsons v. Lyman*, 20 N. Y. 103; *Kelly v. Crapo*, 45 N. Y. 86.

³ *Swearingen v. Morris*, 14 Ohio St. 424; *Johnson v. Copeland*, 35 Ala. 521; *Hill v. Townsend*, 24 Tex. 575; *Townes v. Durbin*, 3 Met. (Ky.) 352;

Grattan v. Appleton, 3 Story, 755; *Williams v. Williams*, 5 Md. 467; 2 *Kent's Com.* *429.

⁴ *Swearingen v. Morris*, 14 Ohio St. 424; *Harvey v. Richards*, 1 Mas. 381; *Daves v. Head*, 3 Pick. 128; *Despard v. Churchill*, 53 N. Y. 192, 199; *Dupuy v. Wurtz*, 53 N. Y. 556; 2 *Kent's Com.* *429.

⁵ *Guillander v. Howell*, 35 N. Y. 657; *Despard v. Churchill*, 53 N. Y. 192, 200.

to enforce the law of the owner's domicile, or to enforce a sale of property there made by him, valid where made, would violate the policy of the State where the property is situated, or be contrary to good morals, or work an injury to citizens or residents of such State, the law of the former will control.¹ So, if the personal property has a sort of fixed locality and purpose, as if the owner has mills or other local property to which there is personal property appurtenant or servient in its uses, then the rule of law is in some respects different.² Under such circumstances personal property thus servient may pass with the realty, under the local laws of the State or country. In regard, however, to remitting the effects of assets of a decedent's estate to the administration at the *domicile*, after satisfying local claims, it is held not to be so much a rule of imperative law requiring the same to be done, as it is a matter within the just and sound discretion of the court.³

Leaseholds. The proceeds of leasehold estates are to be regarded as personal effects, and as coming within the rule of following the person of a decedent, and as distributable in accordance with the law of his *domicile*.⁴

III. SALES AND TRANSFERS VALID WHERE MADE, ARE VALID ELSEWHERE.

A legal transfer of personal property by a duly recorded deed in a State where such transfer carries the ownership, and is valid irrespective of possession thereof, has like validity in all other States where property of the description transferred is by law recognized as property, notwithstanding the absence of possession under such transfer, and notwithstanding no record is made of the deed, in the State or States to which such property is removed, and irrespective of any law of such latter State or States requiring, as a prerequisite to validity, the recording of transfers of such property, where the possession thereof has not passed with the transfer to the grantee in the deed. The contract being valid where made, and not made in reference to performance in

¹ *Guillander v. Howell*, 35 N. Y. 192, 200; *Harvey v. Richards*, 1 Mas. 657; *Despard v. Churchill*, 53 N. Y. 381; *Parsons v. Lyman*, 20 N. Y. 103. 192, 200.

² *Mills v. Thornton*, 26 Ill. 300. 192.

³ *Despard v. Churchill*, 53 N. Y.

⁴ *Despard v. Churchill*, 53 N. Y.

any particular place, is valid everywhere else where the subject matter of it is regarded in law as property. The local State laws thus requiring recording are intended to operate on property within the State, and contracts or sales made within such State, and cannot affect contracts made out of the State as to property also out of the State at the time, however the latter be brought into the State thereafter.¹ Thus, when an absolute title to movables is acquired in a State where the property is situated by the laws of that State, such title will be respected in every other State wherein the property comes, if it be such property or thing as by law of the latter State is regarded as legitimate subject of ownership.²

If, in making such title, the laws of the other State wherein the title was acquired come in question, they are to be proven as facts, State courts not taking notice of the statute laws of other States.³

In *Suarez v. Mayor of New York*, the vice-chancellor lays down the same doctrine in the following terms: "It is an universal principle of jurisprudence at this day, in civilized countries, that the succession of personal or movable property, wherever situated, is governed exclusively by the law of the country where the decedent was domiciled at the time of his death."⁴

Sales Valid and Sales Invalid for Illegal Intent. Although it is the law that if property be sold, and delivered, in the State where the contract is made, and the sale is there legal, and no further act is to be done to complete the transaction on the part of the vendor, the price thereof may be recovered in another State wherein by law such sales would be illegal;⁵ yet if the intent is that the goods shall be illegally sold in another State, or that the vendor shall do some act to assist or aid in the illegal sale, the contract will be treated as void, and will not be enforced in the

¹ *Bank of United States v. Lee*, 13 Pet. 107; *De Lane v. Moore*, 14 How. 253, 266; *Bruce v. Smith*, 3 Har. & John. 499; *Crenshaw v. Anthony, Martin & Yerger*, 102, 110; *Rabun v. Rabun*, 15 La. Ann. 471; *Ockerman v. Cross*, 54 N. Y. 29, 32.

² *Taylor v. Boardman*, 25 Vt. 581.

³ *Taylor v. Boardman*, 25 Vt. 581; *Dakin v. Pomeroy*, 9 Gill, 1. And if no proof be given of what the law of the other State is, then the presumption is that it is the same as the law of the *forum*. *Ibid*.

⁴ 2 Sandf. Ch. 173.

⁵ *Bancher v. Mansel*, 47 Maine, 58, 61.

State where it contemplated the goods were to be disposed of, and wherein by law such sales are prohibited.¹ The case of *De Lane v. Moore* involved an *ante-nuptial* contract entered into and recorded in the State of South Carolina, where the property then was, and the parties then resided; after making and recording the contract, the parties thereto removed to, and became citizens of Alabama, taking the property with them, and there retaining it. After the death of the wife, the husband sold it, or a portion of it, in violation of the *ante-nuptial* contract. One defense against the right of the wife and her representatives set up was, that for want of recording in Alabama, the contract was inoperative, inasmuch as the husband exercised continuously the outward evidences of possession and apparent ownership; but the Supreme Court of the United States as to that point, ruled in favor of the continued force and validity of the contract. DANIEL, J., in delivering the opinion of that court, says: "The position here advanced is not now assumed for the first time in argument, in this court. It has, upon a former occasion, been pressed upon its attention, and has been looked into with care, and unless it be the intention of the court to retrace the course heretofore adopted, this may be now, as it formerly was, called an adjudicated question. The case of *The Bank of the United States v. Lee*,² brought directly up for examination of this court, the effect of a judgment and execution obtained by a subsequent creditor in the District of Columbia, upon property found within that district, but which had been settled upon the wife of a debtor, by a deed executed and recorded in Virginia, according to the laws of that State, the husband and wife being at the time of making the instrument, inhabitants of the State of Virginia. The question was * * * elaborately investigated, and the cases from the different States, founded on their registry acts, carefully collected. * * * This court came unhesitatingly and clearly to the conclusion, that the deed of settlement executed and recorded in favor of Mrs. Lee, in conformity with the laws of Virginia, protected her rights in the subject matter settled, against the judgment of the subsequent creditor in the District of Columbia." Thus, it seems to be well settled in these States, that the ownership of personal property, and its liability

¹ *Smith v. Godfrey*, 28 N. H. 379; ² 13 Pet. 107.

Wilson v. Stratton, 47 Maine, 120.

or non-liability to sale by another, or to execution for the debts of another, are not affected by its removal out of one State into another; for although in the case of *De Lane v. Moore*,¹ the ultimate ruling was against the claim of the wife's heirs, yet that ruling was expressly put upon the staleness of the claim, and the great lapse of time between the time of their arrival of age, the death of the parents, and the time of commencing the suit.

IV. DISTRIBUTION OF A DECEASED PERSON'S MOVABLES.

Follows the Law of his Domicile. The personal property of persons who die intestate is distributable according to the law of the deceased person's domicile, without regard to the place of his death, or the jurisdiction in which the property is situated; and such, too, is the rule in questions involving, in such cases, the inheritable capacity of claimants, as their legitimacy, marriage, and degrees of relationship.²

These principles have prevailed so long and so universally, that they have come to be regarded as part of the law of nations.³ If such be the national usage among governments foreign in every respect to each other, then still more forcible is the reason of the rule among kindred communities like the American States. WAYNE, J., quoting from Erskine's Institutes of the Laws of Scotland, says, in substance, that when a Scotchman dies abroad, his personal estate, in case he dies intestate, descends according to the law of Scotland; and that when a foreigner dies in Britain, his personal estate descends according to the law of his domicile or own country; and that such is the law, whatever the locality of the property may be, and that this law of Scotland, which is an instance of the law of the other European countries on the subject, was at one time different, but is now in accord with the general law, it having been so brought into harmony with the law of the rest of Europe by the decision of the House of Lords, in *Bruce v. Bruce*, 6 Brown's Par. Cases, 550,

¹ 14 How. 266, 267, 268.

² *Ennis v. Smith*, 14 How. 400, 465, 466; *Warren v. Hofer*, 13 Ind. 167; *McClerry v. Matson*, 2 Ind. 79. And in case of ancillary administration, the remaining property, after admin-

istration, should be remitted to the administrator of the domicile by order of court for distribution. *Ibid.* *Green v. Rugely*, 23 Tex. 539; *Moultrie v. Hunt*, 23 N. Y. 394, 404, 405.

³ *Ennis v. Smith*, 14 How. 400.

566.¹ In the earliest decision reported on the subject in the English law, Lord HARDWICKE recognized the rule, that personal estate in cases of intestacy, follows the person and becomes distributable as provided by the law of his domicile.² He reaffirmed the same doctrine a few years afterwards,³ and such has been the doctrine of the English courts ever since. The Supreme Court of the United States, WAYNE, J., in *Ennis v. Smith*, say: "In the United States the rule has been fully recognized," and that "the rule prevails, also, in the ascertainment of the person who is entitled to take as heir or distributee." So it may be regarded as well settled law, that wherever a person may die intestate, his personal property is distributable wherever it may be, according to the law of his domicile.⁴

Lands Descend According to the Law of the State wherein Situated. Not so, however, in regard to the realty. Lands descend, in all cases of intestacy, according to the law of the State or territory in which they are situated.⁵

Removal from the State. If the family of a decedent removes from the State wherein he dies, and take with them, or remove, the personal property of the deceased, into another State, before administration is granted of the estate, and administration be had in the State into which the property is thus removed, then the rights of distribution thereof is in accordance with the laws of the place of decedent's domicile, and from which the property has been removed.⁶

Creditors seeking enforcements of their claims must do it through administration in the State to which the property is removed.⁷

Proof of the Law of the Domicile of Deceased. The law under which such right of distribution is claimed, or under which any other right is claimed, must be produced and proven by the

¹ *Ennis v. Smith*, 14 How. 400, 424, 425.

² *Pipon v. Pipon*, 1 Ambl. 26; *Somerville v. Somerville*, 5 Ves. 750; *Burne v. Cole*, 1 Ambl. 415.

³ *Thorne v. Watkins*, 2 Ves. Sr. 35.

⁴ *Ennis v. Smith*, 14 How. 400, 424, 425; *Olivier v. Townes*, 14 Martin, 92, 99; *Shultz v. Pulver*, 3 Paige, 182.

⁵ *U. S. v. Fox*, 4 Otto, 315, 320; *Wat-*

kins v. Holman, 16 Pet. 25; *Clark v. Graham*, 6 Wheat. 577; *Brown v. Edson*, 23 Vt. 435; *Tardy v. Morgan*, 3 McL. 353; *Blake v. Davis*, 20 Ohio, 231; *Nowler v. Coit*, 1 Ham. 236; *Wilkinson v. Leland*, 2 Pet. 627; *Latimer v. Union Pacific R. R. Co.*, 43 Mo. 105.

⁶ *Green v. Rugely*, 23 Tex. 539.

⁷ *Green v. Rugely*, 23 Tex. 539.

party claiming the benefit thereof.¹ And if not so produced and proven, it will be presumed by the court to be the same as the law of the *forum*, or place where the court is held.² The law, if statutory, should be proven in accordance with the act of Congress of May 26th, 1790.³

V. THE LOCALITY OR SITUS OF MONEY OBLIGATIONS AND DEBTS.

Follows the Owner's Domicile. The legal *situs*, or locality, of bonds, mortgages, and debts generally, and all obligations and undertakings for payment of money, and all choses in action, follows the personal domicile of the owner thereof,⁴ and is not taxable at the residence or domicile of the debtor.⁵

Exception as to Bank Notes. To this doctrine of legal situs there is an exception of circulating bank notes.⁶

In the case of *Cleveland, Painesville & Ashtabula Railroad Company v. Pennsylvania*, the United States Supreme Court advert to and disregard the several decisions of the Supreme Court of Pennsylvania holding a different doctrine from the above. An effort was made by law to tax the bonds, held by non-residents, on the Cleveland, Painesville & Ashtabula Railroad, and to collect the tax by requiring the railroad company to withhold the amount from dividends of such bondholders and to pay the same to the State. The Supreme Court of the United States held, not only that the State laws had no *extra-territorial* force, and therefore could not reach the property of the bondholders, but also that such legislation was void as in violation of the contract between the bondholders and the debtor corporation. That court, FIELD, J., say: "The bonds issued by the railroad company, in this case, are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State." A contrary doctrine would give to an obligation as many places of local situs as there might be

¹ *Atkinson v. Atkinson*, 15 La. Ann. 491.

² *Green v. Rugely*, 23 Tex. 539.

³ 1 U. S. Stat. at Large, 122; R. S. of U. S. 1874, § 906.

⁴ *Cleveland, Pain. & Asht. R. R. Co. v. Pennsylvania*, 15 Wall. 300; *Davenport v. Miss., etc., R. R. Co.*, 12

Iowa, 539; *Railroad Company v. Jackson*, 7 Wall. 262; *People v. Commissioners, etc.*, 23 N. Y. 224.

⁵ *Cleveland, Pain. & Asht. R. R. Co. v. Pennsylvania*, 15 Wall. 300; *People v. Eastman*, 25 Cal. 601; *Murray v. Charleston*, 6 Otto, 432.

⁶ *Supra*.

different domiciles in different States of joint and several obligors or debtors.¹ Nor does it alter the case that the debt be secured by mortgage on real estate situated in a different State than that which is the domicile of the creditor. The mortgage is but a security, and confers no interest on the creditor in the mortgaged property, but only a right to realize his debt thereof over others. If such local mortgage could give a situs to the debt or bonds secured thereby, then in case the security be on lands in different counties or States, which of these localities would become the situs of the debt? It could not be at each. It is with the creditor, or that one of them, if several, who holds possession of the obligation. It follows the person.² And a debt is not property.³

VI. MORTGAGES OF PERSONAL PROPERTY.

Mortgages of personal property made in the State where the property is at the time situated, and which are there recorded as required by law, so as to be valid where made, will be held valid in every other State into which the property is afterwards carried or removed.⁴ This, too, is the law, although possession of the property remains in the mortgageor.⁵

VII. SUBSCRIPTIONS TO CAPITAL STOCK.

Governed by Law of the Company's Residence. Subscriptions made in one State to the capital stock of a private corporation which exists by law in another State, and there transacts and carries on its business and has its principal offices or places of business, are contracts to be performed in the latter State at such place of business, and are governed and are to be construed by the laws of that State.⁶

VIII. VOLUNTARY ASSIGNMENTS.

Of Personalty, How far Valid in Other States. Voluntary assignments of personal property for the benefit of creditors,

¹ Cleveland, Pain. & Asht. R. R. Fleming, 13 Md. 392; Wilson v. Carson, 12 Md. 54; Shelton v. Marshall, 15 Wall. 300. 16 Tex. 344.

² Ibid.

³ Murray v. Charleston, 6 Otto, 432.

⁵ Jones v. Taylor, 30 Vt. 42.

⁴ Jones v. Taylor, 30 Vt. 42; Ferguson v. Clifford, 37 N. H. 86; Jeter v. Fellowes, 32 Penn. St. 465; Fouke v.

⁶ Penobscott R. R. Co. v. Bartlett, 12 Gray, 244.

when valid by the laws of the State wherein they are made, are, upon general principles of public policy and comity, recognized in the courts of other States as obligatory, whether such assignments would have been valid or not if made in such other of the States wherein they are sought to be enforced, except in so far as *bona fide* transfers, payments, liens, or other interests may have intervened.¹

Of Realty, Must Conform to the Lex Loci Rei Sitæ. An assignment to creditors made in one State or Territory of lands situated in a different State, must conform to the law of the place where the lands are situated, in the legality of its purpose. Its validity depends upon the *lex loci rei sitæ*. Thus, an assignment executed in the District of Columbia, in view of insolvency of the makers, of lands situated in the State of Iowa, and designed to prefer certain creditors, is repugnant to the law of Iowa inhibiting such preferences, and will, therefore, be held of no effect in Iowa, and in equity will be set aside.²

IX. WHERE PERSONAL PROPERTY IS TAXABLE.

Taxable Property. Goods and chattels, horses, cattle, and other movable property of a visible or tangible character, are liable to taxation in the jurisdiction or State wherein the same are, and are ordinarily kept, irrespective of the residence or *domicile* of the owner.³ Legal protection and taxation are reciprocal, so that such personal property and effects of a coporeal nature, or that may be handled and removed, as receives the protection of the law is liable to be taxed by the law where it is thus protected.⁴ But this rule does not apply to property

¹ *Brashear v. West*, 7 Pet, 608; *Black v. Zacharie*, 3 How. 483; *Mowry v. Crocker*, 6 Wis. 326; *Whipple v. Thayer*, 16 Pick. 25; *Burlock v. Taylor*, 16 Pick. 335; *Daniels v. Willard*, 16 Pick. 36; *Means v. Hapgood*, 19 Pick. 105; *Holmes v. Remsen*, 4 John. Ch. 400; *Sanderson v. Bradford*, 10 N. H. 260; *Saunders v. Williams*, 5 N. H. 213; *Smith v. Chicago & N. W. R. R. Co.*, 23 Wis. 267; *Ockerman v. Cross*, 54 N. Y. 29, 32; *Atwood v. Protection Ins. Co.*, 14 Conn. 555.

² *Loving v. Pairo*, 10 Iowa, 232.

³ *Hartland v. Church*, 47 Maine, 169; *Steere v. Walling*, 7 R. I. 317; *Mills v. Thornton*, 26 Ill. 300; *People v. Com'rs Taxes*, 23 N. Y. 224; *Leonard v. New Bedford*, 16 Gray, 292; *Riesman v. Shepard*, 27 Ind. 288; *Blackstone Manf. Co. v. Inhabitants of Blackstone*, 13 Gray, 488; *Sangamon & Morgan R. R. Co. v. County of Morgan*, 14 Ill. 163.

⁴ *Bank of U. S. v. Mississippi*, 12 Sm. & M. 456; *De Pauw v. New Albany*, 22 Ind. 204; *Egleston v. Charleston*, 1 Tread. (S. C.) Const. 45.

which is in *transit*, or which is temporarily within a State, as, for instance, if a resident of one State go into another on a visit or business, traveling in his own conveyance, or carrying with him personal effects for his own use during his temporary stay, or sent into a State for sale, such property is not subject to taxation there, although entitled to and receiving the temporary protection of the law for the time being.¹

Intangible Property. Interests of an intangible character are taxable only where the owner makes his residence, for in contemplation of law they accompany the person of the owner; as, for instance, debts owing in one State to a person in another State are not taxable at the place of the debtor's residence.²

Tangible Personal Property. It is said to be a general principle of the law, that tangible personal property having no fixed locality follows the person of the owner and is taxable at his domicile, provided there be no express law taxing it where it is situated, if in a different jurisdiction; but this rule, we think, is confined to cases where the domicile of the owner is in the same State and only in a different county or district, and not to cases where the owner resides in a different State.³ In the case here cited of *Sangamon & Morgan R. R. Co. v. County of Morgan*, Justice CATON, speaking of local taxation of real estate, says: "The same rule does not apply to personal property, but that it follows the residence of the owner is certainly true, and is there taxable when the owner resides *within* the State and the property is only temporarily absent;" and further he gives the following illustration: "Thus, if a man keeping a livery stable in Springfield had a team absent on a journey in another State at the time the assessment was made, he would be bound to include that property in the schedule of taxable property, while the rule might be different if he had personal property permanently located in another State or another county."⁴ The owner of the property in this case was a railroad company; the personal prop-

¹ *St. Louis v. Wiggins Ferry Company*, 40 Mo. 580; *Sangamon & Morgan R. R. Co. v. Morgan County*, 14 Ill. 163; *People v. Com'rs of Taxes*, 23 N. Y. 224, 240; *People v. Com'rs of Taxes*, 23 N. Y. 242.

² *Augusta v. Dunbar*, 50 Geo. 387; *Ante* § v. of this chapter; *Hayne v.*

Delieselline, 3 McCord, 374; *Murray v. Charleston*, 6 Otto, 432.

³ *Sangamon & Morgan R. R. Co. v. County of Morgan*, 14 Ill. 163; *People v. Com'rs of Taxes*, 23 N. Y. 224, 231.

⁴ 14 Ill. 165.

erty was kept in Springfield, Sangamon county, when not in use; when in use it was *in transit* to and through Morgan county and back; the company was an Illinois corporation; and taxes were levied in both counties in the aggregate on the personal and real property. The Supreme Court of Illinois held that the realty was only taxable, each part, in the county where situated, the law being general, and that the personal property was taxable only in Sangamon county, the principal place of business of the company, and where the property was kept when not in use, and was not taxable at all in Morgan county, wherein it only went on business trips.

But, notwithstanding it is justly said, that personal property, though it be of a tangible nature, has no *fixed situs*, yet it is not true that it has no *situs* at all. On the contrary, it has an *actual situs*, but not like that of real property, a *fixed* and *permanent* one. Real property being immovable its *situs* is not only fixed, but is permanent; but personal property being movable, its *situs* is susceptible of change.¹ The *actual situs* of each is in the State where it is situated or located, although the owner resides in a different State; and each being by the law of the locality protected, is in turn, by the law of the locality, liable to be taxed.² By a *fiction* of law, however, of universal import, if there be no law to the contrary at the place of its *actual situs*, the *situs* of the personal property is made to follow the person of the owner and the law of his domicile, if in another State, in all matters pertaining to its sale and transfer by him, and of descent and distribution in case of his death.³

¹ *People v. Com'rs of Taxes*, 23 N. Y. 224, 226.

² *People v. Com'rs of Taxes*, *supra*; *Finley v. Philadelphia*, 32 Penn. St. 381; *Catlin v. Hull*, 21 Vt. 152; *John-*

son v. Lexington, 14 B. Mon. 648.

³ *People v. Com'rs of Taxes*, 23 N. Y. 224, 228, 239; see *supra* §§ i.-iv. of this chapter.

CHAPTER XXI.

LEGAL STATUS AND JURISDICTION OF LANDS.

- I. JURISDICTION AS TO LANDS IS LOCAL.
- II. TITLE PASSES ONLY BY THE LEX REI SITÆ.
- III. COURTS OF OTHER STATES MAY ACT UPON THE OWNER'S PERSON TO COERCE A CONVEYANCE.
- IV. ONE STATE OWNING LANDS WITHIN ANOTHER.
- V. GOVERNMENT LANDS.

I. THE JURISDICTION AS TO LAND IS LOCAL.

The jurisdiction of courts over land is local. Neither State nor Federal courts can reach or confer title, nor sell under a decree those which are situated in a different State from that in which the court sits.¹

In a leading case, *Boyce's Executors v. Grundy*, the United States circuit court for the district of West Tennessee assumed to decree a lien against and sale of lands lying in the State of Mississippi, the Supreme Court of the United States held the decree to be erroneous for want of jurisdiction.² In this case the court say, STORY, J.: "Another objection is to that part of the decree which creates a lien upon the land in controversy, lying in another State, and decrees a sale for the discharge of the lien. We are of opinion that the decree is erroneous in this respect, * * * the court had no jurisdiction to decree a sale

¹ *Boyce v. Grundy*, 9 Pet. 275; *Watkins v. Holman*, 16 Pet. 26. And so in the district as to United States circuit courts. Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co., 15 How. 233; *Watts v. Waddle*, 6 Pet. 400; *Nowler v. Coit*, 1 Ohio, 236; *Brown v. Edson*, 23 Vt. 435; *Latimer v. Union Pac. R. R. Co.*, 43 Mo. 105; *City Ins. Co. of Providence v. Commer-*

cial Bank, 68 Ill. 348; *Ex parte Reid*, 2 Sneed, 375; *Tardy v. Morgan*, 3 McL. 358; *Price v. Johnston*, 1 Ohio St. 390; *Wilkinson v. Leland*, 2 Pet. 627; *Story's Conf. of Laws*, §§ 19, 20, 533, 543; *Rorer on Jud. & Ex. Sale*, 2d ed. § 58; *Brine v. Ins. Co.*, 6 Otto, 627.

² 9 Pet. 275.

to be made of land lying in another State by a master acting under its own authority.”

In *Watkins v. Holman*, just cited, the facts were that Holman had executed in his lifetime, in Massachusetts, a title bond to one Brown, for land situated in Alabama, and had died without making a conveyance therefor. Administration on Holman's estate was granted in Massachusetts. On petition of Brown the probate court in Massachusetts, by a decree, licensed or empowered the administratrix to make conveyance of the property to Brown, who executed to Brown a deed in accordance with the decree. This deed coming in question was held to be void for want of jurisdiction of the court authorizing it to be made. On that subject the Supreme Court of the United States, McLEAN, J., assert the rule of law in the following terms: “That this deed is inoperative, is clear. It was executed by the administratrix under a decree or order of the Supreme Court of Massachusetts and by virtue of a statute of that State. * * * And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the State where the land is situated.”¹

II. TITLE PASSES ONLY BY THE LEX REI SITÆ.

Muniments of Title. It is uniformly held that if the instrument be made in one State for the conveyance of realty situated in another, or for the creating or imposing any lien thereon, or in any manner affecting title thereto, then under all circumstances it must, in substance and in its execution, and also in the evidences thereof, conform to the law of the place where the land to be affected thereby is situated,² for it is a well settled principle of the law that the jurisdiction over real property is local

¹ 16 Pet. 26, 57.

² *United States v. Fox*, 4 Otto, 315, 320; *Brine v. Insurance Co.*, 6 Otto, 627; *McCormick v. Sullivant*, 10 Wheat. 192, 202; *Morgan v. New Orleans R. R. Co.*, 2 Woods, 244; *Darby v. Mayer*, 10 Wheat. 465; *Kerr v. Moon*, 9 Wheat. 565; *United States v. Crosby*, 7 Cr. 115; *Watts v. Waddle*, 6 Pet. 389; *Root v. Brotherson*, 4 McL. 280; *Perry Manf. Co. v. Brown*, 2 W.

& M. 450; *Loving v. Pairo*, 10 Iowa, 282; *Jones v. Berkshire*, 15 Iowa, 248; *Morton v. Smith*, 2 Dillon, 316; *Carpenter v. Dexter*, 8 Wall. 513; *McGoon v. Scales*, 9 Wall. 23; *Secrist v. Green*, 3 Wall. 744; *Clark v. Graham*, 6 Wheat. 577; *Steele v. Spencer*, 1 Pet. 552; *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 15 How. 233; *White v. Howard*, 46 N. Y. 144.

and appertains to the State wherein the property lies, and that title thereto passes only by conformity to the laws of such State.¹ In the language of the United States Supreme Court, FIELD, J.: "The power of the State to regulate the tenure of real property, within her limits, and the modes of its acquisition and transfer, and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted."²

Record as Notice. If the certificates of acknowledgment and of the official character of the person taking the acknowledgment be not in conformity with the law, or be not evidenced as required by the law of the State wherein the land is situated, then, although the deed be of record, yet, as a general rule, it will be invalid as against subsequent purchases without actual notice, as well when the purchase is at execution sale as when by direct conveyance from the owner.³ In some States, however, the record is notice, whether duly authenticated or not, and the

¹ United States *v.* Fox, 4 Otto, 315, 320, 321; Brown *v.* Edson, 23 Vt. 435; Callaway *v.* Doe, 1 Blackf. 372; Tardy *v.* Morgan, 3 McL. 358; Wilkinson *v.* Leland, 2 Pet. 627; Latimer *v.* Union Pac. R. R. Co., 43 Mo. 105; Blake *v.* Davis, 20 Ohio, 231; Nowler *v.* Coit, 1 Ohio, 519; Price *v.* Johnston, 1 Ohio St. 390; Clark *v.* Graham, 6 Wheat. 577; Watkins *v.* Holman, 16 Pet. 26; Darby *v.* Mayer, 10 Wheat. 465; United States *v.* Crosby, 7 Cr. 115; Kerr *v.* Moon, 9 Wheat. 565; Cutter *v.* Davenport, 1 Pick. 81; Sell *v.* Miller, 11 Ohio St. 331; Lucas *v.* Tucker, 17 Ind. 41; Goddard *v.* Sawyer, 9 Allen, 78; Harvey *v.* Marshall, 9 Md. 194; Eyre *v.* Storer, 37 N. H. 114; Lapham *v.* Olney, 5 R. I., 413; Monroe *v.* Douglass, 5 N. Y. 447; Livingston *v.* Jefferson, 1 Brock. 203. And wills, to pass lands, must conform to the law of the place where the land lies. Lapham *v.* Olney, *supra*; Story's Conf. of Laws, § 554. So the courts of one State cannot order sale of lands lying in another State. Blake *v.* Davis, 20 Ohio, 231; Henry *v.* Doctor, 9 Ohio, 49; Newell

v. Coit, 1 Ohio, 519; Wills *v.* Cowper, 2 Ohio, 124; Rorer on Jud. & Ex. Sales, 2d ed. § 58; Brine *v.* Ins. Co., 6 Otto, 627. And a sale on mortgage decree, although of a national court, where by the State law there is a right to redeem, is to be made subject to such right. *Ib.*

² United States *v.* Fox, 4 Otto, 315, 320. Such too is the rule in the United States courts as well as in the State courts. Brine *v.* Ins. Co., 6 Otto, 627.

³ Morton *v.* Smith, 2 Dillon, 516. This rule holds good, too, in regard to the capacity of the grantor to convey. Whether the deed be executed in the one State or the other, the status of the grantor as to legal capacity to convey must be such as is required by the law of the State wherein the lands lie. It is not enough that he be of age by the law of the State where he has his domicile and makes the conveyance, he must be of age by the law of the place or State where the land is situated. Barnum *v.* Barnum, 42 Md. 251.

defect only goes to the requirement of other proof of the deed when offered in evidence than is afforded by such defective acknowledgment or certificate thereof; and such is the law of Illinois.¹

Foreign Deeds. When, by the law of the State wherein the property is situated, deeds therefor executed in other States are to be acknowledged and certified, or proven to have been executed in conformity to the laws of such other State where made, then courts of the United States, when the same comes in question before them, will take judicial notice of those laws.²

Evidence of Official Character. Nor need there be any evidence of the official character of the officer certifying acknowledgment or proof of the conveyance, unless the statute in the State where the land lies requires it.³

Foreign Wills and other Instruments. So, in regard to wills of real estate, made in a State other than the one in which the lands are situated, they must be executed and evidenced in accordance with law of the latter State.⁴

If, however, as is often the case, the law where the land is situated requires deeds or other instruments affecting lands, when executed at a place out of the State of their locality, to be executed, acknowledged, or proven, and certified in conformity to the law of the place where executed, then the requirements of the law of that place is in effect the requirements of the law of the place where the land is situated, and compliance therewith is sufficient.⁵

The rule that the *lex rei sitæ* governs in conveyances of real property is asserted with much force in *Crusoe v. Butler*.⁶ This case involved the effect of a will made, probated and allowed in one State of lands situated in another State, and it was held that although to carry title to real estate in another State than where made and probated, it must be then probated according to the

¹ *Carpenter v. Dexter*, 8 Wall. 513.

² *Carpenter v. Dexter*, 8 Wall. 513, 531; *Cheever v. Wilson*, 9 Wall. 108; *Pennington v. Gibson*, 16 How. 65, 80.

³ *Carpenter v. Dexter*, 8 Wall. 513, 531.

⁴ *Kerr v. Moon*, 9 Wheat. 565; 1 *Redfield on Wills*, *398.

⁵ *Secrist v. Green*, 3 Wall. 744; *Car-*

penter v. Dexter, 8 Wall. 513; *Cheever v. Wilson*, 9 Wall. 108; *Pennington v. Gibson*, 16 How. 80.

⁶ 36 Miss. 150; *McCormick v. Sullivant*, 10 Wheat. 202; *United States v. Crosby*, 7 Cr. 115; *Kerr v. Moon*, 9 Wheat. 565; *Wells v. Wells*, 35 Miss. 638.

law of the latter, yet, that in Mississippi, on presentation of a copy from where originally probated in the State where made, authenticated as a record, in accordance with the act of Congress, it may then be admitted to probate in Mississippi, and will pass lands situated therein.¹

Executory Contracts and Deeds made in Pursuance Thereof. Sometimes the transaction is partly affected by both the law of the place of contracting and the law of the *situs* of the property contracted for. Thus, if an executory bargain be made in one State to purchase lands situated in another State, the manner of perfecting the bargain, so far as relates to the transfer or title to the land, is to conform to the *lex rei sitæ* of the property, or law of the State where the land is situated; but the executory contract itself is construed and controlled, if not otherwise expressed, by the law of the place of contracting.²

Official Powers are Local. The acknowledgment and certification of a deed taken and made by an officer of a State must be taken and certified within the State under which the officer holds his authority to do the act. He cannot receive or certify the acknowledgment in a different State than the one under the laws of which he holds his office or has power to act.³ In a case in Delaware, the court say: "The taking the acknowledgment of a deed is an official, perhaps a judicial, act, and the authority of the public officer cannot extend beyond the limits of his appointment."⁴

III. COURTS OF OTHER STATES MAY ACT UPON THE PERSON OF THE OWNER.

Jurisdiction over the Person. But, although a State court cannot, in law or in equity, reach or control the title to lands, or the possession of lands situated within a different State, by any direct action or process against the land itself, and cannot decree away the title thereto, or authorize a commissioner to convey the same, yet if a court of general equity jurisdiction obtain jurisdiction of the person of the owner of lands so situated, in the course of an equity proceeding involving a proper case for coercion of the title by a direct action of the court, as in cases of

¹ *Crusoe v. Butler*, 36 Miss. 150;
Wells v. Wells, 35 Miss. 638.

³ *Harris v. Burton*, 4 Harr. (Del.) 66.

² *Glenn v. Thistle*, 23 Miss. 42; *Bethell v. Bethell*, 54 Ind. 423.

⁴ *Ibid.*

trust or fraud, or even contract, in case the lands were within its jurisdiction, then such equity court may compel a conveyance by order or decree acting directly on the person of such owner, and may enforce the same with all the powers incident to a court of chancery in case of disobedience.¹ And so it may compel a sale of realty lying partly out of its jurisdiction for the satisfaction of a trust or mortgage, by direct action against the persons of those concerned, if it get jurisdiction of their persons. But in such cases the court does not convey or authorize the act. It merely acts on the person, and compels the exercise of powers already by him possessed. It is not like conferring power on an administrator to sell lands lying in another State. The latter cannot be done.²

In the case cited below of *Muller v. Dows*, the circuit court of the United States for the Iowa district decreed a sale of the whole of a railroad, which lay part only in Iowa, and the other part in Missouri, and the proceeding was sustained by the United States Supreme Court. But this was a proceeding in a national court, and the parties in interest were in court, and the case is not as one in a State court, whose jurisdiction over the local property is circumscribed within the boundaries of its territorial limits; whereas, United States courts doubtless have power to reach interests, however local, in a chancery proceeding, with all the parties before them, if enough of local jurisdiction be obtained as to a part of property involved, and which is an entirety, to enable them to act on the part so situated within the district of the *forum*; especially so where, as in the case just cited, both States are within the same circuit of a United States court.

When such a decree of a court of one State compelling the

¹ *McElrath v. Pittsburgh & Steubenville R. R. Co.*, 55 Penn. St. 189; *Watkins v. Holman*, 16 Pet. 26; *McGregor v. McGregor*, 9 Iowa, 65; *Masie v. Watts*, 6 Cr. 148; *Sturdevant v. Pike*, 1 Ind. 277; *McLean v. Lafayette Bank*, 3 McL. 622; *Watts v. Waddele*, 6 Pet. 389; *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 15 How. 233, 243; *White v. White*, 7 Gill & J. 208; *Vaughan v. Barclay*,

6 Whart. 392; *Lewis v. Darling*, 16 How. 1; *Corbett v. Nutt*, 10 Wall. 464.

² *McElrath v. Pittsburgh & Steubenville R. R. Co.*, 55 Penn. St. 189; *Muller v. Dows*, 4 Otto, 444, 450, in which latter case the United States Supreme Court refer to and recognized the correctness of the Pennsylvania case above cited. *Wood v. Warner*, 15 N. J. Eq. 81, 85.

conveyance of land situated in another State comes in question in the courts of the State wherein the land is situated, it will be entitled to full faith and credit in these latter courts as to what is the real or true equities of the parties thereto, if jurisdiction of the defendant in the decree was obtained by the court rendering the same; and such decree may be pleaded as a defense to an action or suit, or as a cause of action, if applicable, in the courts of such latter State.¹

Actions for Breach of Covenant. And actions for breach of covenant of quiet enjoyment may be maintained in the courts of one State when the covenant was entered into in another State in reference to a subject matter situated in the latter.² Such action affects the person of the defendant or covenantor, and not the status or title of the land.

IV. ONE STATE OWNING LANDS WITHIN ANOTHER.

Not Different from Private Ownership. The ownership of lands by one State within the territorial limits of another State is in nowise different from that of the ownership of an individual person. The title and estate in such case is acquired and held subject to all the incidents of ordinary private ownership, so far as regards the mere circumstance of a State being the owner.³ If a different effect is claimed it must flow from the intent and purpose of the grant as shown by the muniments of title.

V. GOVERNMENT LANDS.

The doctrine as to local jurisdiction of lands, and of the title passing only in accordance with the *lex loci rei sitæ* laid down in the previous sections of this chapter, has no application to the public lands of the United States. Over these the States and local governments have no control, and the State laws do not affect them in any manner whatever, until the title thereto passes out of the national government in such manner as is provided by national law.⁴

¹ Burnley v. Stevenson, 24 Ohio St. 474.

² Jackson v. Hanna, 8 Jones Law, 188; Mott v. Coddington, 1 Robert. 267.

³ Burbank v. Fay, 65 N. Y. 57;

Boggs v. Merced Co., 14 Cal. 279, 375; 3 Wash. Real Prop. 4th Ed. 188, § 19.

⁴ Turner v. American Baptist Missionary Union, 5 McLean, 344; Wilcox v. Jackson, 13 Pet. 499.

Title from National Government. The national government only can grant to individuals, States or other grantees the right and title to the public lands of the United States.¹

Congress has the sole power of declaring the dignity and effect of a patent or grant of lands issued or granted by the United States, and the character of the title thereby vested in the grantee to government lands thus disposed of, and no State law can lessen or enlarge the same; such grants carry the fee, and are the best title known to the law in both national and State courts.²

Action at Law will not Lie on Certificate of Entry in United States Court. It is equally well settled in the United States courts that no action *at law*, for recovery of lands, will lie against a defendant in possession, upon a mere entry or certificate of entry or purchase from the register and receiver of the United States land office. These are but evidences of an equity, and do not pass the legal title; and, though State statutes may allow such equitable evidence as a ground of recovery in State courts, against a defendant showing no better title, yet such statutes are not a rule of law or property in courts of the United States as evidence of legal title.³

Revocation of Patent. When the title has passed from the government by the issuance and delivery of the patent for lands, then the power of the political and ministerial departments of government over them ceases, and such patent cannot be revoked by mere act of the head of the land department, or secretary of a department. The courts of law or equity alone possess the power of setting the same aside for cause shown according to the course of local practice and jurisdiction, if in a State court, or of the Federal jurisdiction and practice, if the proceeding be in a United States court.⁴

¹ *Mitchel v. United States*, 9 Pet. 712; *Johnson v. McIntosh*, 8 Wheat. 543; *United States v. Fernandez*, 10 Pet. 303; *United States v. Rillieux*, 14 How. 189; *Wilcox v. Jackson*, 13 Pet. 499; *Hooper v. Scheimer*, 23 How. 235.

² *Hooper v. Scheimer*, 23 How. 235;

Wilcox v. Jackson, 13 Pet. 499; *Bagnell v. Broderick*, 13 Pet. 436; *Irvine v. Marshall*, 20 How. 558.

³ *Hooper v. Scheimer*, 23 How. 235.

⁴ *Moore v. Robbins*, 6 Otto, 530; *U. S. v. Hughes*, 11 How. 552, and *S. C.*, 4 Wall. 232.

CHAPTER XXII.

CRIMINAL JURISDICTION.

- I. OF THE NATIONAL COURTS.
- II. OF THE STATE COURTS.
- III. WRIT OF ERROR FROM UNITED STATES SUPREME COURT TO STATE COURT.
- IV. INCIDENTS TO NATIONAL LOCAL JURISDICTION.
- V. INTER-STATE EXTRADITION OF FUGITIVES FROM JUSTICE.
- VI. POWER OF ONE STATE TO ENFORCE THE PENAL LAWS OF ANOTHER AND TO PUNISH CRIME COMMITTED IN ANOTHER.
- VII. LARCENY AT COMMON LAW BY BRINGING STOLEN PROPERTY INTO A STATE.
- VIII. CRIMES COMMITTED PARTLY IN ONE STATE AND PARTLY IN ANOTHER.
- IX. CRIMES COMMITTED IN A STATE WITHOUT THE OFFENDER BEING THEREIN.
- X. NO CONCURRENT CRIMINAL JURISDICTION IN STATE AND NATIONAL COURTS.

I. OF THE NATIONAL COURTS.

The national courts, according to best received opinions, have no common law criminal jurisdiction, or jurisdiction over common law offenses, as such; their jurisdiction is of statutory authority, and confined to offenses arising under the Constitution and laws of the United States.¹

But as to the entire absence of criminal common law jurisdiction there has been expressed a judicial doubt.²

There can be no doubt, however, that where, in the exercise of their legitimate jurisdiction over statutory offenses, the principles of the common law, as existing in criminal jurisprudence in the original States, when applicable, will be resorted to as rules of right.

¹ U. S. v. Hudson, 7 Cr. 32; Penn-
sylvania v. Wheeling Bridge Co., 13

How. 518; U. S. v. Fox, 5 Otto, 670.

² U. S. v. Coolidge, 1 Wheat. 415.

Jurisdiction of United States Courts of Offenses Against State Laws. The United States courts cannot entertain jurisdiction of State offenses. They can punish only crimes against the United States. Thus it has been held that Congress could not give jurisdiction to United States courts to try indictments found in the State courts.¹ So, where a person indicted in a State court for selling intoxicating liquors, which by the State law is a misdemeanor, notwithstanding the fact that the accused has a license under the revenue laws of the United States, the trial of such indictment cannot be removed into the United States courts.²

The criminal jurisdiction of the Federal courts being thus limited to offenses against the Constitution and laws of the United States, it follows that all other cases come within the jurisdiction of the courts of the States.

II. CRIMINAL JURISDICTION OF THE STATE COURTS.

The State courts have exclusive jurisdiction, within their respective territorial limits, of all crimes, offenses, misdemeanors and penalties arising under the rightful authority of the State constitutions and laws, except such as occur in the national forts, arsenals, and other places belonging to, and under the criminal jurisdiction of, the United States, hereinafter more fully designated.

Jurisdiction of State Courts of Offenses Against the United States. The same rule applies in such cases, as we have seen above, applies to offenses against the States, not being triable in United States courts.

The State tribunals cannot punish crimes against the laws of the United States *as such*. The same act may, in some instances, be an offense against both, and it is only as an offense against the State laws that it can be punished by the State.³

III. ERROR FROM UNITED STATES SUPREME COURT TO STATE COURT.

If, however, in a prosecution for any violation of such laws, in any trial in a State court, a defense be set up, under and by

¹ *People v. Murray*, 5 Parker Cr. v. Tuller, 34 Conn. 280; *State v. Zulich*, 5 Dutch. 409; *Matter of Hopson*, 40 Barb. 34; *Ross v. State*, 55 Geo. 192.

² *State v. Elder*, 54 Maine, 381.

³ *People v. Kelly*, 38 Cal. 145; *State*

alleged authority of the Constitution or a law of the United States, and the ruling be against the validity of such defense, then error lies to the United States Supreme Court, from such decision, if in the highest State court having jurisdiction or power to hear and determine the same.¹

IV. INCIDENTS TO NATIONAL LOCAL JURISDICTION.

As a sequence to local jurisdiction of the Federal courts over crimes committed in forts and other places exclusively under Federal criminal jurisdiction, also follows the power and authority, everywhere else in the States necessary to the carrying of the same into effect; thus, if the offender flee from such places to some place beyond, the authority of the Federal government and courts extend to the arrest and return of the culprit; so, where the court sits elsewhere, as is usually the case, the authority extends to the transferring of the prisoner through the States to the place of trial; and, likewise, where the punishment is to be inflicted outside of such places, as in a State prison, at some other place, jurisdiction extends to all necessary acts of transportation of the convict to the place of punishment; and where the law, in case of capital punishment, directs the body of the deceased to be delivered up to medical persons for dissection, a like authority accompanies those in charge of it elsewhere than at the place of trial and conviction; and so, where by law the rescue of such body of the executed person is made criminal by the United States laws, then the power of the Federal government and courts extend wherever in any State it may be necessary for the arrest and punishment of those offending against such law; and the law itself exists in force, as a general law, everywhere alike throughout the States, so as to render the act criminal wherever committed.² And this general force and authority of the Federal laws and courts is not the mere creature of the necessity thereof, to carry out and complete jurisdiction in cases where given, but results from the constitutional provision making the Constitution itself, and the laws enacted in virtue thereof, the supreme law of the land, everywhere, at all times, and in all places. That is: supreme in their own rightful sphere and

¹ *Cohens v. Virginia*, 6 Wheat. 264, 414, 415, 416, 421.

² *Cohens v. Virginia*, 6 Wheat. 264, 425, 426.

orbit; supreme over and in relation to such things as they rightly pertain to under the national Constitution, while the State constitutions and laws have, at the same time, equal force and vitality in their proper spheres and judicial orbits, neither detracting from the powers of the other.¹

National Municipal Corporations. But laws of the national Congress, enacted for purposes of local government, as for instance, the incorporation of a city, will not be construed by the courts, unless expressly so stated, to be intended to operate or confer power to operate, or do acts beyond the territorial limits of the corporation; and more especially such acts as may be in violation of the penal or criminal laws of a State. Thus, the act of Congress incorporating the city of Washington, and conferring on the city authorities power to establish a lottery, under certain circumstances, by consent of the President, is not construed to enable the city to sell lottery tickets in a State the laws of which prohibit lotteries and sales of lottery tickets.²

V. INTER-STATE EXTRADITION OF FUGITIVES FROM JUSTICE.

Among the Colonies. Though the extradition of criminals as between certain of the English-American colonies prior to the declaration of American independence, and afterwards under the Articles of Confederation before the adoption of the national constitution, are not subjects strictly pertinent to this chapter as partaking of the relation of the States to each other, or to the national government under the constitution, yet as matter of inducement thereto, and as leading to a correct exposition of the present system of extradition, they are subjects proper to be treated of, and as pointing out the origin of the same among the American communities.

While the North American-English communities were colonies of the crown, a sense of mutual interest and security led to the making of a compact among a portion of them, for the mutual rendition or delivery up of persons fleeing from justice from any one of them, where charged with crime, and seeking refuge in any one of those colonies which were party to the compact. Thus, as early as the year 1643, the plantations under the gov-

¹ *Cohens v. Virginia*, 6 Wheat. 264, 414, 427, 428, 429.

² *Cohens v. Virginia*, 6 Wheat. 264, 447.

ernments severally of Massachusetts, New Plymouth and New Haven, in articles of confederation, pledged their faith to each other, that on escape of any criminal or fugitive for any criminal cause, from any one to any other of said colonies, the colony wherein he shall be found, should, upon certificate of two magistrates of the jurisdiction from which the escape occurred, stating that he was a prisoner or an offender at the time of making the escape, forthwith grant the proper warrant for the apprehension of such person and the delivering him into the hands of the officers, or other persons in pursuit of him.¹

Under the Articles of Confederation. When, after the Declaration of Independence, the thirteen colonies entered into articles of confederation, they included therein a similar but more explicit provision for extradition or rendering up mutually to each other of persons fleeing from justice, in any State into another of the States, worded as follows: "If any person guilty of or charged with treason, felony, or other high misdemeanor, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."²

Under the Constitution. Afterwards, upon the adoption of the Constitution of the United States, the same provision was literally included therein, that had existed in the articles of confederation, with the exception that for the words "*high misdemeanor*," was substituted the word "*crime*;" and it is held by the United States Supreme Court, that the word "*crime*" thus substituted includes every offense made punishable by the law of the State in which it is committed.³ It will be seen that in the original compact of certain of the colonies above referred to, the word "*treason*" was not used, inasmuch as these colonies not being then sovereignties, treason could not be committed against them;⁴ but that in the Constitution of the United States, and in the articles of confederation, that word is used, as the colonies had then become independent States, and the crime of treason

¹ Winthrop's History of Massachusetts, Vol. II. 121, 126; Kentucky v. Dennison, Governor of Ohio, 24 How. 66, 100, 101; Commonwealth v. Deacon, 10 S. & R. 129.

² Articles of Confederation, Art. IV.; Kentucky v. Dennison, Governor of Ohio, 24 How. 66, 101, 102.

³ Ibid.

⁴ Ibid.

could therefore be committed against them as such; and also, for the purpose of negating the idea, that this extraditionary duty extended no further than the previous ordinary *comity* between sovereigns, under which the more general practice had been not to deliver up *political* criminals, or persons charged only with a political offense, and that therefore in order to obviate all doubt upon the subject, on forming these closer relations, first of confederation, and afterwards, of one common national constitution, the word *treason* was used.¹

By virtue, then, of this provision of the national constitution, it becomes the duty of a State to deliver over to another State a person fleeing from justice from one of such States into or found within such other, who is charged with any offense whatever made punishable by law in the State from which such person shall have fled.² But the Supreme Court of the United States hold this *duty* to be but a *moral* one, not enforceable by any authority of law, and resting solely on the sense of patriotism and fidelity of the person charged with the performance thereof to the solemn compact of the constitution.³

Duty to Surrender. The insertion of the foregoing provision into the Constitution of the United States, renders absolute the duty of rendering up criminals by one State to another, which before the adoption of the country, was entirely a matter of *comity*, optional with the State or States of which the requirement was made; for without such a clause, it is held in the American courts to be mere matter of discretion.⁴

¹ Articles of Confederation, Art. IV.; Kentucky *v.* Dennison, Governor of Ohio, 24 How. 66, 101, 102.

² *Ibid.*

³ *Ibid.*

⁴ Kentucky *v.* Dennison, Governor of Ohio, 24 How. 66; Prigg *v.* Commonwealth, 16 Pet. 539; Holmes *v.* Jennison, 14 Pet. 540; Commonwealth *v.* Green, 17 Mass. 514-548; Commonwealth *v.* Deacon, 10 S. & R. 125; Case of Jose Ferreira dos Santos, 2 Brock. 493; United States *v.* Davis, 2 Sumn. 482, 486; Compton *v.* Wilder, 7 Am. Law Record, 212; Taylor *v.* Taintor, 16 Wall. 366. The duty of surrendering

criminals on the part of the States, it would seem from the use of the word "shall," in the clause of the Constitution here referred to, is compulsory. And yet, there being no power lodged in the United States to compel the execution by the States of that clause, the duty seems to be one entirely discretionary, so far as the United States laws are concerned. But some of the individual States have made local regulations, which, in effect, make the constitutional provision binding and free from all discretion upon their officers who are charged with the execution of the same.

Nature of the Offense for Which Extradition is Asked. As to the nature of the offenses referred to in the 4th Article of the Constitution above cited, it is held that all offenses made punishable by law in the State where the act charged is committed, come within the meaning of the words "treason, felony or other crime," and therefore that extradition of fugitives by force of said provision is obligatory upon the State to which they have fled, for any crime made punishable by the laws of the State making the demand.¹

The rendering up the fugitive, when a case is made out filling the exigency of the law, or constitutional provisions above referred to, leaves no discretion with the State of which the demand is made as to the nature of the crime.² The requisition, or proceeding upon which the surrender is sought, must show that the alleged crime was committed within the jurisdiction of the State making the application.³ So, too, the charge must be positive, and not merely upon information, or information and belief.⁴

U. S. Courts Have Power to Examine Into Charge. The courts of the United States have full power and jurisdiction over cases of this nature, and may examine into the sufficiency of the proceedings, and discharge the prisoner or remand him to the custody from whence taken, as the principles of the law may require; for the proceeding on which the arrest is ordered is predicated upon the Constitution and authority of the United States; and this, too, notwithstanding the State in which the order of arrest is made has legislated upon the same subject.⁵

What Must be Shown to Justify the Delivery of the Fugitive. To justify the arrest and delivery of a person to the authorities of another State by the authorities of the State wherein he may be found, as a supposed criminal and fugitive from justice in such other State, it is necessary under the Federal Constitution and laws that the charge of criminality shall have been made in

¹ *Kentucky v. Dennison*, Governor of Ohio, 24 How. 66; *In re Voorhées*, 32 N. J. Law, 141; *In re Hughes*, Phillips' (N. C.) Law, 57; *In re Heyward*, 1 Sandf. 701; *In re Fetter*, 3 Tab. 311; *In re Greenough*, 31 Vt. 279; *Brown's Case*, 112 Mass. 409; *Hurd's*

Law of Habeas Corpus, 2d Ed. 601.

² *Kentucky v. Dennison*, Governor of Ohio, 24 How. 66.

³ *Ex parte Smith*, 3 McL. 121.

⁴ *Ibid.*

⁵ *Ibid.*

the State demanding him to some court, magistrate or officer, in form of an indictment, information, affidavit, or other accusation known to the laws of such State, and charging the offense to have been committed therein.¹ An arrest not based on such charge is unauthorized, and the court before which it is made, or the prisoner is brought, is without jurisdiction thereof, and the proceedings are void.²

It follows, therefore, that as a court before whom a person thus arrested without authority is brought, is without jurisdiction over the person of the accused, that a bond taken for his appearance at a subsequent day before such court to answer the charge, and which is given as a means of obtaining a discharge from such illegal restraint, is void.³ In the case of *State v. Hufford* the arrest was made on a charge preferred in Iowa, on affidavit, without any charge or demand from the other State, and the proceeding was held void.

Object of Our Extradition Law. Its Perversion Cannot be Used for Civil Obligations. The provision of the United States Constitution, article IV., for the extradition of persons charged with treason, felony, or other crime, who flee from justice and are found in another State, is designed to enable a State to vindicate its sovereignty and laws, by trial and punishment in its own *forum*, of those who violate the same, and is designed for no other purpose. It is in nowise intended for the benefit of private persons, or for enforcement by them, and may not be resorted to for the purpose of bringing a debtor of the prosecutor within a State for the purpose of obtaining jurisdiction of his person in a civil suit, or to coerce out of him surety for a debt. The law will not tolerate so oppressive and corrupt a proceeding and abuse of process, and any contract or obligation made by a person under an arrest thus procured, or with his friends, for the purpose of effecting his release, will be held null and void.⁴

¹ *State v. Hufford*, 28 Iowa, 391; *People v. Brady*, 56 N. Y. 182; *Ex parte Clark*, 9 Wend. 219; *Hurd's Law of Habeas Corpus*, 2d Ed. 212, 610.

² *State v. Hufford*, 28 Iowa, 391; *Ex parte Smith*, 3 McL. 121; *Ex parte Clark*, 9 Wend. 212; *In re Heyward*, 1 Sandf. 701.

³ *State v. Hufford*, 28 Iowa, 391, 396.

⁴ *Fay v. Oatley*, 6 Wis. 42; *Carpenter v. Spooner*, 2 Sandf. 717; *Snelling v. Watrous*, 3 Paige, 314; *Benninghoff v. Oswell*, 37 How. Pr. 235. But parties who are not concerned in bringing the so-called fugitive back, it has been held would not be precluded from suing or *capiasing*, even

Demand of the Governor of the State of the Fugitive. This process of extradition by a State, of a person found as a fugitive therein, by delivery over to the authorities of another State, is only authorized upon demand of the executive of such other State, and where a criminal charge is actually pending against an alleged fugitive in the State making the demand.¹ In such cases, the proceeding in the State making the demand must be such, as is usual in similar charges against residents thereof, and the warrant, indictment, and demand, must specify the nature of the crime charged.²

May be Surrendered for High Misdemeanors. High misdemeanors are held to be within the meaning of the word "crime" as used upon the subject of surrendering fugitives from justice, in the Constitution of the United States.³

Copy of the Indictment need not accompany Demand. It is not necessary that a copy of the indictment found in the State making the demand, shall accompany the writ of the executive or governor, authorizing the arrest and delivery over of the fugitive; it is sufficient if referred to in the writ.⁴

Sufficiency of the Charge, may be examined into on Habeas Corpus. The judicial power may be interposed by writ of *habeas corpus* in cases of arrests for extradition, and the sufficiency of the charges and regularity of the proceedings be examined into.⁵

Sufficiency of Affidavit. Fugitive from Justice. An affidavit of a person of one State that he was "shot with intent to kill, * * * and that he believes, and has good reason to believe from evidence now in his possession, that a certain person therein named was accessory before the fact of the intended murder; and that the said person is a citizen and resident of another State," on the governor of which a requisition is made for delivery of the implicated person, is not sufficient to sustain a demand for the arrest and

though the fugitive was brought back by trick or device. *Adriance v. Lagrave*, 59 N. Y. 110. See, however, *Wanzer v. Bright*, 52 Ill. 35.

¹ *Ex parte White*, 49 Cal. 434; *Commonwealth v. Deacon*, 10 S. & R. 125; *People v. Brady*, 56 N. Y. 182.

² *Ex parte Culbreth*, 49 Cal. 436; *Commonwealth v. Deacon*, 10 S. & R. 125; *Ex parte Pfitzer*, 28 Ind.

450; *People v. Brady*, 56 N. Y. 182.

³ *Morton v. Skinner*, 48 Ind. 123.

⁴ *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Ind. 10.

⁵ *People v. Brady*, 56 N. Y. 182; *In re Manchester*, 5 Cal. 237; *Ex parte Thornton*, 9 Tex. 635; *Lagrave's Case*, 14 Ab. Pr. (N. S.) 333; *Williams v. Bacon*, 10 Wend. 636.

extradition of the alleged criminal, since the same does not fulfill the requirements of the law in showing or charging that the supposed culprit has fled from justice in one State and has taken refuge or is found in the other.¹

In this case, the court say: "It is the duty of the State of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister State. Any one violating the law would be amenable to the laws of Illinois executed by its own tribunals. Those of *Missouri* could have no agency in his conviction and punishment. But if he shall go into *Missouri*, he owes obedience to her laws, and is liable before her courts to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another State would not avail him. If he escapes, he may be surrendered to *Missouri* for trial. But when the offense is perpetrated in *Illinois*, the only right of *Missouri* is to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war, and violate territory."

In the matter of *Manchester*, who was demanded of the governor of California by the governor of Ohio, as a fugitive from justice, the court of California held that the governor making the demand, is the proper judge of the authenticity of the document relied on, and that behind his judgment the courts of California could not go; and that although the papers did not in words charge that the prisoner was a "*fugitive from justice*," that still the allegation being that he committed the crime and secretly fled, is sufficient from which to deduce that conclusion.²

Fugitive being in Custody under Local Process when delivered up. However formal and legal the requisition or demand may be, when made by a governor of a State upon the governor of another State for the extradition of a person found therein, yet if the person demanded be in actual custody of the officers of the law, on either criminal or competent civil process, to answer some offense or action where so in custody, he cannot be delivered up until the demands of justice and law are satisfied or exhausted under which he is so held. The State of which the demand is made is not bound to postpone its own legal claims to dispose of

¹ *Ex parte Smith*, 3 McL. 121, 138, 139; *Jones v. Leonard*, 13 West. Jur. 15.

² 5 Cal. 237.

the person of the offender, or of its own laws to those of the other; but, on the contrary, only after the same are satisfied. Then the party should be delivered up.¹

Fugitive Returned under an Invalid Process may be tried—when not. In Pennsylvania it is held that if a prisoner who is under indictment for a crime in that State and flees to another, is arrested and returned without lawful authority, yet that will not be ground for his discharge without trial, if the governor of the State from which he is thus illegally taken does not demand his discharge.²

Extradition among the States based exclusively on the Constitution—not upon Comity. The power of the several States to render up alleged criminals, found within their limits to the authorities of each other, as matter of mere *comity* as practiced sometimes between States *entirely foreign* to each other does not exist, as we conceive, under our National Constitution. By section 2 of article IV. of that instrument, it is provided that “the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.” Thus a citizen of one State has not only a right to change his residence into another State, but also a right to become a citizen of the latter, and there remain,³ *as against* all natural right of such State to extradite him, banish him, or deliver him over to any other actual or pretended power, and it results, therefore, that the only authority as between the American States, for the extradition of criminals, is that provided by the National Constitution, and if the proceeding be not in conformity thereto, extradition cannot be enforced.⁴ For a citizen of a State is a citizen of the United States,⁵ and a State cannot expel a citizen of the United States from its territory or extradite him therefrom except in the manner provided by the National Constitution.

As Between a State and a Foreign Power. A State has no power to grant, or cause, the extradition of one of its citizens, on demand of a foreign power, or any government not being one of

¹ *In re Briscoe*, 51 How. Pr. 422.

² *Dows' Case*, 18 Penn. St. 37.

³ *Corfield v. Coryell*, 4 Wash. C. C. 371.

⁴ *Ex parte Smith*, 3 McL. 121; *State v. Hufford*, 28 Iowa, 391; *Ex parte Clark*, 9 Wend. 212; *In re Heyward*,

1 Sandf. 701; *Fay v. Oatley*, 6 Wis. 45; *Ex parte White*, 49 Cal. 433; *Ex parte Culbreth*, 49 Cal. 435; *People v. Brady*, 56 N. Y. 182; *Ex parte Thornton*, 9 Tex. 635.

⁵ *Gassies v. Ballou*, 6 Pet. 761.

the States or Territories of the American Union. The United States alone possess that power. Under the Constitution the intercourse with foreign powers is vested exclusively in the United States.¹ Therefore, State statutes authorizing such extradition are unconstitutional and void.²

For a State to be able to exercise this power of extradition would be, in effect, to enable one alone of the States to surrender up to a foreign power *citizens of the United States*; for citizens of the States are citizens of the United States;³ not even the highest officer of the government would be exempt from subjection to such authority, if found within the limits of any one of the respective States, whether justly accused or not, thereby imperiling the operation, if not the existence, of national authority.

The case cited from New York originated in an application of the kingdom of Belgium, through its minister, for the extradition of a person charged, in said kingdom, as alleged, with the crimes of murder, robbery and arson. The governor of New York, upon whom the request was made, issued his warrant and caused the arrest to be made, with intent to deliver up to the agent of the Belgian government, in pursuance of an act of the legislature of the State. The case being brought before the courts upon *habeas corpus*, it was held by the court, and the ruling was affirmed by the court of appeals, that the act of assembly was unconstitutional, as a violation of the Constitution of the United States, which places in Congress and the national government the exclusive power as to intercourse and treaties with foreign nations; and that, therefore, the warrant of the governor was void. The constitutionality of the State law, and power of the governor to extradite the prisoner, were attempted to be sustained as of those powers which, though conferred upon Congress, yet a State may exercise until Congress has acted upon the subject, and that as the United States had not by treaty with Belgium regulated or assumed the duty of extraditing fugitives from that kingdom, from justice, the State of New York had power to act upon the subject. But the court utterly ignored the power as appurtenant to a State, and held that the

¹ *People v. Curtis*, 50 N. Y. 321; *Holmes v. Jennison*, 14 Pet. 540.

² *People v. Curtis*, 50 N. Y. 321.

³ *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Read v. Bertrand*, 4 Wash. C. C. 556.

exclusive power is in the national government. The court of appeals, CHURCH, C. J., say: "The whole subject of foreign intercourse is committed to the Federal government. Indeed, this was one of the principal purposes of the Union. As to foreign countries, the States, as such, are unknown. * * * If one State may, all the States may make these arrangements, which arrangements may differ from each other; and the same States may make different arrangements with each foreign nation. The embarrassment which such an exercise of power by the States would produce to the general government in its foreign policy is obvious. * * * It cannot be said, from the absence of a treaty with any country, or with all countries, that the power is dormant. It may be as much exercised by refusing, as by making a treaty."¹

Right of a State to Punish for Other Crime than that Alleged as Ground for Extradition. Whatever the obligation of good faith may require as between foreign nations, as to holding prisoners extradited under treaty stipulations for such offense only as is specified in the application for extradition,² yet no such obligation rests upon the American States, as between themselves, in regard to prisoners extradited from one of these States to the other, under the provisions of the national Constitution, and the act of Congress³ for carrying the same into effect, and State courts have a right to hold and try persons, thus extradited from one to another of them for other crimes than that upon which the extradition proceedings are based, if allegations of other crimes against the State are preferred against the prisoner.⁴

VI. POWER OF ONE STATE TO ENFORCE THE PENAL LAWS OF ANOTHER AND TO PUNISH CRIMES COMMITTED IN ANOTHER.

Offenses are Local. One State or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offenses committed in and against another State or sovereignty.⁵

¹ 50 N. Y. 326, 327.

² *In re Noyes*, 17 Alb. Law Jour. 407.

³ Act of 12th of February, 1793, Revised Stat. U. S. § 5279.

⁴ *In re Noyes*, *supra*.

⁵ *The Antelope*, 10 Wheat. 66, 123;

State v. Knight, Taylor's, (N. C.) 65; *Scoville v. Canfield*, 14 John. 338; *Slack v. Gibbs*, 14 Vt. 357; *Commonwealth v. Green*, 17 Mass. 515, 548; *Simpson v. The State*, 4 Humph. 456; *State v. Carter*, 3 Dutch. 499; *Story's Conf. of Laws*, §§ 620-623.

Such laws have no *extra-territorial* force. If it were ever a subject of doubt elsewhere, yet as between the American States all doubts are put at rest, and a contrary intention is shown by Section 2 of Article IV. of the Constitution, which provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State *having* jurisdiction of the crime." This provision clearly presupposes that criminals are to be tried and punished in the State wherein they commit offenses; and, upon the well settled principle that the *including of one is the exclusion of the other*,¹ shows with additional clearness that jurisdiction was regarded as appertaining exclusively to the State whose laws should be offended against, and wherein the crime should be committed: hence the words "to be removed *to the State having* JURISDICTION of the crime." Nor is it supposable that a people who had, in their bill of rights, so recently made complaint against the crown of Great Britain, of their subjection to trial for pretended offenses, beyond seas, ever intended that their citizens, being in other States, should be there tried for supposed crimes, alleged to have been committed in, and against the laws of, their own State.

Thus, in New York, in a somewhat early case, it was held that a dual marriage outside the State, as for instance, one marriage in another American State than New York, and then another by the same man in Canada, is not bigamy in New York, criminally punishable there, although the last married parties come into and reside and cohabit in the State of New York, ostensibly as husband and wife. The second marriage, in Canada, took place beyond the force of New York law, and was not, therefore, in violation thereof; and the cohabiting, afterward, in New York, was but adultery.²

VII. LARCENY AT COMMON LAW BY BRINGING STOLEN PROPERTY INTO THE STATE.

Whether bringing stolen property, by the thief, out of one State into another State, foreign to each other in the light in

¹ "*Inclusio unius est exclusio alterius.*" *Branch's Principia*, 59; *Broom's Maxims*, * 652.

² *People v. Mosier*, 2 *Parker's Cr. Cases*, 195.

which the American States are to each other foreign, amounts to larceny at common law in the State into which it is brought, and is there punishable as such, is a question upon which the decisions of the courts are by no means uniform.

The Rule in England. In England the ruling is, that bringing stolen property out of France into England does not constitute larceny, and is not punishable in England as such.¹

In some American States. So, likewise, there is the same ruling in many American cases, not only as between the several American States, but also in reference to cases arising in Canada. It is held that bringing the stolen property into the State, or having it in possession therein by the thief, does not, at common law, amount to larceny in the State into which it is thus brought, and that there can be no punishment of such person therein.²

American Rulings to the Contrary. On the other hand, it is held in the courts of others of the States, that the bringing stolen property by the thief into another State amounts to larceny in the latter State, and is there punishable as such.³ Many of these rulings in favor of jurisdiction were made under statutory provisions, which we will take occasion to refer to.

The True Rule at Common Law. The true rule at common law we believe to be, that *bringing* stolen property by the thief out

¹ *Reg. v. Madge*, 9 C. & P. 29; *Reg. v. Prowse*, Ry. & M. 349; Roscoe Cr. Ev. 7th Am. Ed. 662; 2 Russ. on Crimes, 4th Eng. Ed. 328 *et seq.*; 4 Bac. Abt. Bouvier's Ed. 179; *Reg. v. Anderson*, 2 East P. C. 772, c. 16, s. 156.

² *State v. Brown*, 1 Hayw. (N.C.) 100; *People v. Schenck*, 2 John. 479; *People v. Gardner*, 2 John. 477; *People v. Loughridge*, 1 Neb. 11; *State v. Newman*, 9 Nev. 48; *Stanley v. State*, 24 Ohio St. 166; *Simmons v. Commonwealth*, 5 Binn. 617; *Simpson v. State*, 4 Humph. 456; *Commonwealth v. Uprichard*, 3 Gray, 434; *Beal v. State*, 15 Ind. 378; *State v. Reonnals*, 14 La. Ann. 276; *State v. LeBlanch*, 31 N.J. 82; *State v. Bennett*, 14 Iowa, 479.

³ *Commonwealth v. Cullins*, 1 Mass. 116; *Commonwealth v. Andrews*, 2

Mass. 14; *State v. Douglass*, 17 Maine, 193; *Hamilton v. State*, 11 Ohio, 435; 1 Bish. Cr. L. §§ 136-144; *State v. Ellis*, 3 Conn. 186; *Henry v. State*, 7 Cold. 331; *Tyler v. People*, 8 Mich. 320; *Commonwealth v. Uprichard*, 3 Gray, 434; *People v. Williams*, 24 Mich. 156; *State v. Cummings*, 33 Conn. 260; *State v. Williams*, 35 Mo. 229; *Ferrill v. Commonwealth*, 1 Duval, 153; *State v. Underwood*, 49 Maine, 181; *Commonwealth v. Holder*, 9 Gray, 7; *Watson v. State*, 36 Miss. 593; *State v. Stimpson*, 45 Maine, 608; *Commonwealth v. Beaman*, 8 Gray, 497; *Ham v. State*, 17 Ala. 188; *Hemmaker v. State*, 12 Mo. 453; *State v. Seay*, 3 Stew. 123; *People v. Burke*, 11 Wend. 129; *State v. Bennett*, 14 Iowa, 479.

of the State where stolen into another State, does not amount to larceny at common law in the State in which it is thus brought, and is not punishable as such therein. That to make it a crime punishable therein, it must be so declared by statute; and in such case it is the act of *bringing the stolen property into the State, and not the stealing of it* in the other State, that is to be punishable by statute; for one State cannot punish a crime committed in another against the laws of such other, for such laws have no force, except in the State where enacted; nor can it punish in virtue of its own laws, for they likewise are confined in authority to the State where enacted, and not being in force in the State where the crime is committed, are in no manner violated. Nor would a local law be valid providing for such a state of things. It would be void as assuming to reach beyond the territorial boundaries of the enacting power; but a law making it a crime, of whatever name it might be called, to bring into a State, or have possession therein, of property stolen in another State, knowing it to have been stolen, when such bringing in or having in possession is with intent to prevent the true owner thereof from regaining possession of the property, and punishing such crime on indictment and conviction, would doubtless be valid. Nor would or should such a law and punishment be a defense, if pleaded on a trial for larceny in the State where the act of stealing was committed, for in the one case the crime is the larceny, and in the other it is the bringing stolen property into a different State; or having it therein, with intent to prevent its being regained by the owner. The one act is a crime against the laws of one State, and the other act is a distinct crime against the laws of the other. But whatever a State and its courts may assume to do, whether to punish as a common law offense, or by virtue of some statutory provision of its own, the bringing of stolen property into its territorial limits, yet, in virtue of the national Constitution, it is compelled to deliver up the culprit, and desist from either, on demand of the State wherein the principal crime is committed, properly made under the national laws and Constitution.¹ In the case cited of *People v. Williams*, the learned Justice COOLEY, in reference to this duty of delivering up the culprit to another jurisdiction, says: "It may be suggested that, to sustain

¹ *People v. Williams*, 24 Mich. 156, 166.

this, jurisdiction might stand in the way of the performance of constitutional obligation on the part of the States to return fugitives from justice. There does not appear to me to be any difficulty on that score. When one is demanded as a fugitive from justice, the paramount law requires his surrender, and there can be no pretense for refusal, when the crime alleged in this State is not the principal offense, but consists simply in persistence in the crime committed in the State demanding him."¹ To our mind the constitutional obligation to deliver up the thief precludes the idea of punishment in the State to which he has fled, as for committing in the other State the original offense, but does not deprive the State into which the stolen property is brought of the right or power to pass laws making the act of bringing it into the State a crime, and of punishing it as such. But the constitutional obligation to deliver up the culprit is paramount in any event.

Statute of Michigan Providing for Punishment of Thief Bringing Property into the State. In Michigan there is a statute declaring that "every person who shall feloniously steal the property of another, in any other State or country, and shall bring the same into this State, may be convicted and punished in the same manner as if such larceny had been committed in this State, and in every such case such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought."² It was under this statute, and not as at common law, that the prosecution in the *People v. Williams*, above cited, was carried on, and consequently the very able remarks of the learned jurist, COOLEY, in reference to the jurisdiction of the court and State in such cases are to be taken as made in reference to this statute, and the power to and duty of the States to provide for such cases by statute.

Iowa. In Iowa there is also a statute intended to meet such cases. It declares that, "When the commission of a public offense commenced without this State is consummated within the boundaries thereof, the defendant is liable to punishment therefor in this State, though he was without the State at the time of the commission of the offense charged: *Provided*, He consummated the offense through the intervention of an innocent or

¹ 24 Mich. 166.

163; 2 Compiled Laws of Mich. 1871,

² *People v. Williams*, 24 Mich. 156, § 7606.

guilty agent within this State, or any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated."¹ It was upon this statute that the prosecution of *State v. Bennett*² was attempted to be sustained; but the court held the statute inapplicable to the case, and sustained the conviction upon general principles, "that the continued possession of the property stolen is itself a complete and full larceny."

New York; Illinois; Alabama. By statutes in both New York and Illinois, the offense of bringing stolen property into the respective States is made punishable.³ So, also, in Alabama.⁴

The Law of the Trial. If the punishment inflicted by the State into which the stolen property is brought is to be regarded as a punishment of the *larceny* committed in the other State, then by what law shall the prisoner be tried, and by the terms of what law shall the punishment be measured? If by the law of the State where the larceny was committed, then as such laws have no *extra* territorial effect, and as a State does not administer the criminal laws of another State, trial and punishment by virtue thereof is impracticable. If, on the other hand, the trial and punishment of the larceny committed in the other State is to conform to the law of the *forum*, the law of the State into which the stolen property is brought, then this law in like manner, having no *extra* territorial force, is not the law against which the offense was committed in the State where the larceny was committed, for this law never was in force there, and, therefore, never has been violated. Moreover, the degree of punishment is not necessarily the same in each of the States by the statute law of each; so that if the punishment be measured by the law of the State in which the larceny occurred, it may be more severe than punishments of like offenses committed in the jurisdiction of the *forum*, so that it may result that such crimes committed in a different State are punished more severely in the courts of a neighboring State than local crimes therein of its own citizens are punished; and so, on the other hand, the power to pardon, vested in the Governor of the State into which the

¹ *State v. Bennett*, 14 Iowa, 479, 490, 481; Revision of 1860, § 4505; Code of 1873, § 4157.

² 14 Iowa, 479.

³ Rev. Stat. N. Y. Part 4, Chap. I., Tit. 7, § 4; Rev. Stat. Ill. 1874, 407, § 399.

⁴ Rev. Code Ala. 1867, 707, § 3713.

property is brought and in which conviction is had, is so exercised as to pardon (if a pardon be granted) a crime committed in a different State.

Plea in Bar of Second Trial. If after trial, conviction and pardon abroad, or after trial, conviction and suffering the punishment abroad, the convict return to the State wherein he actually committed the larceny, and is arraigned for trial there for the same offense, are these proceedings in a different State a good plea in bar in his defense? To us it is clear that no such power exists or can be enacted by legislatures of the States to punish crimes committed in other States. The spirit of the National Constitution forbids it, wherein the duty is imposed upon the States to surrender criminals.

As to the necessity of a State protecting itself from being made a refuge for the criminals of other States in case they are not followed and demanded, it were constitutional and sufficient to make it by statute a crime to thus abuse the hospitality of a State—a distinct crime from the original offense. It is no hardship, then, or violation of constitutional law, that the culprit be punished in turn for each. Nor can *comity* confer such a power of enforcing the criminal laws of other States. *Comity* judicially exercised is confined to the enforcement of contract, personal liabilities usually recognized as such by civilized nations and which follow the person wherever he goes, and to such torts committed upon the person or personal property as are recognized at common law as such, and in regard to which actions are of a transitory nature; and whoever seeks a *remedy* for these obtains it according to the law of the *forum*.

If larceny committed in one State is to be punished in another, then may also most offenses.

The Supreme Court of New York, soon after the decision of the case of the *Commonwealth v. Cullin*,¹ above referred to, decided directly to the contrary in two similar cases, and thus the principle was settled in New York,² until by the revised statutes of that State it was enacted that “every person who shall feloniously steal the property of another in any other State or country and shall bring the same into this State, may be convicted and punished in the same manner as if such larceny had

¹ 1 Mass. 116.

² *People v. Gardner*, 2 John. 477;
People v. Schenck, 2 John. 479.

been committed in this State; and in every such case such larceny may be charged to have been committed in any town or city into or through which the stolen property shall have been brought." Subsequently, in a prosecution under this statute (which seems to have been copied from that above referred to, of Michigan,) it was held by the Supreme Court of New York that the defendant, who had brought stolen property from Canada, where it was stolen by him, into New York, was liable to be tried and punished therein;¹ but that the trial and punishment was for bringing in the stolen property as an offense against the State, and not for the original crime committed in Canada.² The court say, SAVAGE, C. J.: "It is not the larceny in Canada which we punish, but the larceny committed in the State of New York, in every place into which the stolen property has been brought."³

In the case of the *People v. Gardner*,⁴ above cited, the court say: "When the original taking is out of the jurisdiction of this State, the offense does not continue, and accompany the possession of the thing stolen, as it does, in the case where a thing is stolen in one county and the thief is found with the property in another. The prisoner can be considered only as a fugitive from justice from Vermont."

In the subsequent case, in Massachusetts, of the *Commonwealth v. Uprichard*, the Supreme Court of that State hold that the doctrine laid down by that court in *Commonwealth v. Cullin* and in *Commonwealth v. Andrews* is inapplicable to cases of larceny occurring in *foreign* countries, as in Canada for instance, while in a case in Michigan,⁵ in 1863, the Supreme Court of that State were equally divided as to jurisdiction in regard to a larceny committed in Canada, the stolen property having been brought by the thief into the State of Michigan.⁶

The case of *Commonwealth v. Cullins*, cited above, and decided by the supreme court of Massachusetts in 1804, seems to have held much weight in subsequent rulings in favor of the jurisdiction of a State to punish crime committed in a neighboring American State, in cases where the guilty party brought the fruits of his guilt into the State of the *forum*. In that case the larceny was committed in the State of Rhode Island, and the stolen prop-

¹ *People v. Burke*, 11 Wend. 129.

² *Ibid.*

³ 11 Wend. 434.

⁴ 2 John. 477.

⁵ 3 Gray, 434.

⁶ *Morrissey v. People*, 11 Mich. 327.

erty was brought by the thief into Massachusetts. He being there arrested and tried, instead of being remanded to Rhode Island, the supreme judicial court held that the courts of that State had jurisdiction of the offense, and he was convicted and sentenced accordingly.¹ The jurisdiction was expressly sustained on the principle of English law, making the thief liable as for a new taking in any and every county wherein he entered in England with the stolen goods. Yet it is obvious, that there is not the semblance of a parallel between the relative political or judicial position of the American States toward each other, and that of the several counties toward each other in England. The latter are of the same sovereignty. The States here are independent of, and in their jurisprudence foreign to, each other. Even in England, such offenses committed in Scotland are not within the jurisdiction of the English courts, although both these countries are subject to the same government. It is clear, then, that the reason of the rule asserted in the Massachusetts case does not exist in the United States, and where the reason of the law fails, the law itself does not exist. In the Massachusetts case above cited, *Commonwealth v. Cullins*, the relation of the American States are erroneously recognized as the same as is the relation of two counties in the same State to each other, totally ignoring the sovereignty of the State. The court said, SEDGWICK, J., that they were "clearly of opinion that stealing goods in one State and conveying stolen goods into another State was similar to stealing in one *county* and conveying the stolen goods into *another*, which was always held to be felony in both counties, and therefore the jury (if they believed the witness) would find the defendant guilty."² We may remark here, that when the larceny is in one county, and trial in another, within the same State or kingdom, the law of the crime and of the measure of punishment is always the same, whether tried in one or the other of the counties. But not so when the crime is committed in one *State*, and the trial is had in *another State*. What is grand larceny in one may be petty larceny in the other. The punishment in one may be at the whipping post; in the other it may be in the penitentiary. As between two *counties*, the offense is nevertheless committed, wherever triable, against one and the same sovereignty;

¹ *Commonwealth v. Cullins*, 1 Mass.

² 1 Mass. 117.

but as between two States, the original offense is committed against one of them, and if tried in another State the trial is for violations of the law thereof, and not of the State where the crime is committed; for one State cannot administer the criminal laws of another State. If the trial be, however, *for bringing stolen property into the State*, and that is by statute there *made criminal*, then there can be no question as to jurisdiction. The subsequent case of *Commonwealth v. Andrews*¹ was mainly put upon authority of *Commonwealth v. Cullins* above referred to, and the doctrine of similar relations of States and of counties was therein again erroneously assumed. In the case of *Hamilton v. The State*, cited above, as ruling in favor of the jurisdiction, the supreme court of Ohio hold that, on general principles, a theft in one State is liable to be punished in another State wherein the stolen property is brought by the thief, as a contrary course would "afford a large immunity for crime."² But READ, J., in his dissenting opinion, more judicially suggests that it were an easy matter for the State to enact a law making it criminal for the thief to bring into the State property stolen by him in another State. If, however, such statutory provision were made, it would remain to determine the law of the other State, to ascertain if by the law there the act amounted to larceny; so, even then it would have become necessary to construe and act on the law of both States, as the act, in view of either one alone, would not amount to a crime in the State where the trial was pending, and thus would recur the question again of the power to enforce or act upon the criminal laws of a foreign State.

In the case of *Commonwealth v. Uprichard*, the whole subject is reviewed most ably by Chief Justice SHAW; and though the court in that case followed the law as settled in the cases above cited from Massachusetts, yet this decision clearly shows that not only these earliest cases in Massachusetts were erroneously decided, and that the principle of analogy therein declared between States of the Union and counties in the English Kingdom does not exist; but the learned judge says, in substance, that if the question was a new one, a different conclusion would perhaps be now come to.³ While this case conforms to the rule of law, as already settled in Massachusetts, the very lucid and learned

¹ 2 Mass. 14, 19.

² 11 Ohio, 435.

³ *Commonwealth v. Uprichard*, 3 Gray, 434, 439.

opinion clearly shows that the true rule of the law is the other way, and that the courts of one State have no power, whether at common law or by statute, to punish crimes committed in other States or in any manner inflict punishments involving the enforcement of the criminal laws of such other States.

Mississippi. By statute, in Mississippi, a person who steals property in another State and brings it into the State of Mississippi, is indictable and punishable in like manner as if the crime were committed in the said State, and the venue may be charged in any county into or through which the property shall have been brought.¹ In prosecutions under such a statute it is held that to charge a defendant with larceny, as committed merely in a certain county, without words to bring the case within the statute, by showing or alleging the offense to have had its inception in another State, is bad. The charge in the indictment should bring the case within the language of the statute. The case of *Stanley v. The State*² involved the question as to bringing stolen property into the State from Canada. In this case the ruling in *State v. Bartlet*³ and *Sun v. Underwood*⁴ were referred to and disapproved, and the rule adopted that goods stolen in a *foreign* country and brought into Ohio would not subject the thief to a prosecution in that State. But where the goods were stolen in another *State* and brought into Ohio, the court intimated that they would feel bound by a prior decision,⁵ and would hold the thief liable to a prosecution for larceny.

Thus, then, the rule of law established in Ohio in *Hamilton v. The State*,⁶ that bringing stolen property into the State from a sister State wherein it has been stolen is larceny at common law, has been denied in cases where the property is brought in from a *foreign State* wherein it had been stolen.⁷

In the case above cited⁸ the court seem to still tolerate the

¹ *Norris v. State*, 33 Miss. 373; Commonwealth *v. Beaman*, 8 Gray, 497. And if live property be stolen and killed in one State, and be carried dead into another, even if otherwise punishable, it is not sufficient to charge generally in the indictment the stealing and bringing the property in, but the particulars must be so alleged as to show the fact of

the property being brought in dead. Ibid.

² 24 Ohio St. 166.

³ 11 Vt. 650.

⁴ 49 Maine, 181.

⁵ *Hamilton v. State*, 11 Ohio, 435.

⁶ 11 Ohio, 436

⁷ *Stanley v. State*, 24 Ohio St. 166.

⁸ Ibid.

doctrine of *Hamilton v. The State* upon the principle of *stare decisis*, but regards it as otherwise illfounded; and McIVAINE, J., says: "I have no doubt the Legislature might make it a crime for a thief to bring into this State property stolen by him in a *foreign* country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offense. But that offense would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the *rules* of the *common law*, without reference to any other country."¹

In the case, *State v. Ellis*,² already cited, although the supreme court of errors maintain the doctrine that bringing stolen property by the thief into another State than where stolen is larceny, yet it is conceded that it is only so by analogy, as in cases between counties in England; but the court adheres to the original ruling, in that it is too late to recur to first principles, citing at the same time the early cases in Massachusetts as establishing the same doctrine, also recurring again to the English cases; but to our opinion the *rule* and *reason* of the law as laid down in the opinion of PETERS, J., in the same case in a dissenting opinion is not only more reasonable, but the better law in these States, the constitutional relations of which contemplate the delivery up and punishment of criminals in the State and under the laws thereof wherein crimes are committed, in case the culprit be found in another State. There is a brief, but interesting, summing up of the rulings on this subject in *People v. Loughbridge*, where the right to exercise any such inter-State authority is denied. The court, after referring with approbation to the practice in regard to goods stolen and brought from one county to another in the same State, very aptly says: "To extend this application to States, is to attach to the crime of larceny penalties uncertain in their character, possibly greatly incommensurate with the offense committed and such as do not attend any other crime."³

¹ Stanley v. State, 24 Ohio St. 166, 174.

² 3 Conn. 188.

³ 1 Neb. 11, 13.

VIII. CRIMES COMMITTED PARTLY IN ONE STATE AND PARTLY IN ANOTHER.

Difficult questions of inter-State law occasionally arise in respect to offenses committed partly in one State and partly in another; as where the act is done to a person in one State which results in his death in another; or where fire is wantonly set in one State to a building situated partly in that State and partly in another; or, as if one fire a gun in one State across the State line into another State at, and intentionally thereby kill a person situated in the other State. The decisions of the American courts in this respect are by no means uniform. Under a statute of Michigan declaring that if a mortal wound shall be given, or other violence or injury shall be inflicted, or poison administered on the high seas or on any other navigable waters, or on land, either within or without the limits of that State, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death may happen.¹

In a case under this statute the supreme court of Michigan held it to be constitutional and valid.² In the case here cited, the wound which caused the death was inflicted within the limits of Canada—that is, upon that part of the river St. Clair which is on the eastern or Canadian side of the boundary line between the United States and Canada—and the death resulting from that wound occurred within the county of St. Clair, in the State of Michigan. The defendant being convicted of manslaughter, the supreme court of Michigan held the jurisdiction to be rightful and affirmed the conviction.³ The supreme court of Michigan, MANNING, J., in illustration of their ruling, say substantially that the wrong act itself, and the wound which was the immediate consequence thereof, did not constitute the offense. That, had death not ensued, the prisoner would have been guilty of assault and battery, not murder, and would have been criminally accountable to the laws of Canada. But that the consequences of the wrongful act were not confined to Canada; that they followed the injured person into Michigan, where they con-

¹ Tyler v. People, 8 Mich. 320, 332.

² Ibid.

³ Ibid.

tinued to operate until the crime was consummated in his death.¹ In an early case in New Jersey, on the other hand, it has been held that such a law as the one above referred to as existing in Michigan, is necessarily void.² But in the case of *Hunter v. The State*, decided as late as November, 1878, in New Jersey, Chief Justice BEASLEY, after a very logical discussion of this question, in giving the opinion of the court on the disputed point, whether the courts of New Jersey, under their local statute, could punish a person giving a mortal blow within the jurisdiction of that State, where the death of the victim occurs within that of another State, held that the courts had no such jurisdiction. The court also denies the correctness of the earlier case cited above.³

Where the Offense is Committed by a Person Out of the State Through a Resident. Accessories. On this subject we have been able to find but few cases, and the conclusion of these are to some extent in conflict. The better and more generally accepted doctrine would seem to be that which holds that a person who resides in another State, but procures a person within the State to commit a felony is not guilty of any offense punishable in the State where the offense was committed.⁴

False Pretenses. If a person makes a sale in one State of that of which he falsely pretends to be the owner, but in fact to which he has no right whatever, and in pursuance to such sale executes a conveyance therefor and receives the purchase money in another State, he is guilty in the latter State of obtaining money by false pretenses, and may be prosecuted and punished therefor in the courts of the latter State. The offense, though conceived in the first named State, is in such cases actually committed in the latter State, where, by reason of such false pretenses and still holding them out and acting on them, he obtains the money.⁵

¹ *Tyler v. People*, 8 Mich. 320, 332.

² *State v. Carter*, 3 Dutch. 499.

³ *Hunter v. State*, 40 N. J. Law, 495. See, also, *Commonwealth v. Macloon*, 101 Mass. 1, where the court holds that the State wherein the death occurs has jurisdiction to punish the offender who committed that which caused the death outside of the State.

This is a very instructive case, and valuable for its thorough discussion of this subject.

⁴ *State v. Wyckoff*, 31 N. J. Law, 65; *State v. Moore*, 26 N. H. 448; *State v. Knight*, 1 Taylor (N. C.) 65. But, see *contra*, *State v. Grady*, 34 Conn. 118.

⁵ *Commonwealth v. Van Tuyl*, 1

In the case cited from Kentucky, the *Commonwealth v. Van Tassel*, the defendant sold in Ohio, in times of slavery, a negro whom he claimed as his property, and pretended he had recaptured him there as a fugitive from service in Tennessee, and delivering the negro to the purchaser to take out of Ohio at his own risk, they crossed into Kentucky, where the conveyance was made and the money paid to the vendor, when, in fact, the negro was a freeman. On indictment of the pretended owner, in Kentucky, for obtaining the money by false pretenses, it was held that the offense was committed in that State and that the courts there had rightful jurisdiction of the case.

Where one made false pretenses, in Indiana, and relying upon which the person to whom they were made delivered goods in New York to the one who made the false pretenses, it was held that the person so making the false pretenses was not liable to indictment in Indiana.¹

IX. CRIMES COMMITTED IN A STATE WITHOUT THE OFFENDER BEING THEREIN.

Crimes may be committed in a State without the wrong-doer or offender being present therein.² This, too, as well through the agency or instrumentality of an innocent person who is resident or otherwise present in such State,³ as the direct act or conduct committed or done by the wrong-doer outside of the State, whereby an injury is inflicted on a person therein or a crime therein committed against the State.⁴

For such crimes the culprit may be rightfully tried and punished, if caught within the State, so as to get jurisdiction of his person, just as if the offender had been actually within the State when the crimes were committed, and regardless of the fact as to whether the offender owed allegiance to the State or not, so far as such crimes are of the class known as such against natural

Met. (Ky.) 1; *Adams v. People*, 1 N. Y. 173, though not precisely in point, may be referred to with advantage. See, also, *ante*, § 6 of this chapter.

¹ *Stewart v. Jessup*, 51 Ind. 413.

² *Adams v. People*, 1 N. Y. 173; *Thayer v. Brooks*, 17 Ohio, 489; *State*

v. Ellis, 3 Conn. 185; *State v. Wyckoff*, 31 N. J. Law, 65; *State v. Moore*, 26 N. H. 448; *State v. Grady*, 34 Conn. 118.

³ *Adams v. People*, 1 N. Y. 173, and other cases cited above.

⁴ *Adams v. People*, 1 N. Y. 173; *Thayer v. Brooks*, 17 Ohio, 489.

law as well as against the statute laws of the State.¹ These natural laws are written upon the hearts of men as well as in the statute books of States, and existed before government existed, and are binding everywhere, in all countries, and at all times.² Of the declaratory and administrative regulations of the State, it may be different; these are more for the government of the citizens than for all who chance to come within the State or may offend therein by acts done from without.³ As to persons owing allegiance to a State and who have not expatriated themselves by casting off the same, they may be punished if found therein for some crimes and offenses committed at places, if outside of other legal jurisdictions, beyond the boundaries of the State whereof they are citizens or subjects; thus, for treason, wherever committed.⁴

In regard to mere personal injuries or torts at common law thus inflicted by persons while in one State upon the persons or property of others in another State, such injuries may be prosecuted by private action in the State where the injuries are suffered, if the aggressor be found therein or wherever he be found.⁵ The case of *Adams v. The People*, above referred to, was a conviction for obtaining money by false pretenses. The defendant, residing in Ohio, by means of false grain receipts purporting to show delivery to him of a quantity of grain to be forwarded to a commission house in New York, obtained money thereon through an innocent agent in that city to whom the paper was forwarded for collection. The defendant afterward went to New York, was there arrested, indicted, tried and convicted, although he was not in that State at the time the money was obtained.⁶

The case of *Thayer v. Brooks* was one brought in a court of Ohio against a citizen of Pennsylvania, service being effected in Ohio, for a nuisance or injury caused to plaintiff's real property—a mill site and mill situated in Ohio—by diverting, in Pennsylvania, the waters of a lake which fed a stream which supplied water power to plaintiff's mill in Ohio. The Supreme Court of

¹ *Adams v. People*, 1 N. Y. 173; *Thayer v. Brooks*, 17 Ohio, 489; *Jones v. Leonard*, 13 West. Jur. 15.

² *Adams v. People*, 1 N. Y. 173.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Smith v. Bull*, 17 Wend. 323; *Chapman v. Wilber*, 6 Hill, 475; *Northern Cent. R. R. Co. v. Scholl*, 16 Md. 331; *Thayer v. Brooks*, 17 Ohio, 489.

⁶ 1 N. Y. 173.

Ohio held that the action would lie.¹ Such, too, no doubt, is the law, for the action for injury to the realty being local, the rightful jurisdiction at law is in the State where the injured property is situated.²

But in *Thayer v. Brooks*, the court went further and said, that in such actions for injuries to the realty, where the injurious act is done in one State and the injury resulting therefrom is to property situated in another State, the action would lie in either State, citing as authority therefor the rule laid down by Chitty³ that "when an injury has been caused by an act *done* in one *county* to land, etc., situated *in another*, the venue may be laid in either."⁴ This doctrine, as to *counties* of the *same* State, does not apply, however, as between two States. The error in that respect consists in supposing the legal *relations* of the American States to be the same as that of English counties toward each other, as was erroneously held in an early case in Massachusetts.⁵

By statute in Indiana, it is declared that "every person, being without this State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof, in the same manner as if he were present, and had commenced and consummated the offense within the State."⁶ The Supreme Court of Indiana hold that this statute is not to be construed to embrace persons who out of the State become mere accessories before the fact to crime committed in the State.⁷ The case is not the same when a party who is outside the State procures an innocent party in the State, to commit an act within the State, which, though innocent in respect to his own intent, is nevertheless the consummation in its effects of a criminal act in such State. In the latter case, the promoter of the act who is without the State, brings about within the State the entire act and circumstances that amount to the crime, and he is therefore guilty

¹ *Thayer v. Brooks*, 17 Ohio, 489.

² *Watts v. Kinney*, 23 Wend. 484; *Livingston v. Jefferson*, 1 Brock. 203.

³ 1 Chitty on Plead. 999.

⁴ *Thayer v. Brooks*, 17 Ohio, 489-493.

⁵ *Commonwealth v. Cullins*, 1 Mass. 116. The error as to the supposed analogy between counties and States

is clearly illustrated in *Commonwealth v. Uprichard*, 3 Gray, 434, although the ruling in *Commonwealth v. Cullins* was followed, but upon a different principle than the alleged analogy.

⁶ *Johns v. State*, 19 Ind. 421, 423.

⁷ *Ibid.*

as principal of the act criminal in itself, within the State which constitutes the crime, and is the principal therein.¹ In such case the innocent person in the State is the means used to perpetrate the crime therein, just as if a person who out of a State shoots across the line into another State and therein intentionally kills another person, is in such case guilty of committing the criminal act within the State without himself being at the time therein. He does so by using the ball, as the means of perpetrating the crime, propelled into the State by force of the gun and powder therein, instead of by force of his own will, using the person of an innocent individual to bring about the criminal result.²

X. NO CONCURRENT CRIMINAL JURISDICTION IN STATE AND NATIONAL COURTS.

In the early history of our national jurisprudence, laws of Congress were passed conferring on State courts jurisdiction under the national laws, in cases brought by the United States to recover penalties and forfeitures for violation of revenue laws, to the same extent as the jurisdiction in that respect of District courts of the United States, and also to take proof and hear and determine as to the remission of such penalties and forfeitures under the acts of Congress in reference thereto. For a time, those powers were exercised by the State courts, without objection, as mere matter of *comity*, but not as a duty obligatory in law; but in the course of time, some of the States authorities declined the exercise thereof as infringing too much upon the time and labor of the State courts, and others from a doubt, also, as to the authority thus emanating from a different sovereignty, unless confirmed expressly by the legislative department of the State;³ so that the policy of their jurisprudence came to be in that respect altered by law. Since then it has uniformly been held, or recognized as law, that State courts cannot take cognizance of crimes against the national government and laws.⁴ Thus, perjury committed, in an oath taken under an act of Con-

¹ Johns v. State, 19 Ind. 421, 423.

² See as bearing on this point, Johns v. State, 19 Ind. 428.

³ Kentucky v. Dennison, Governor of Ohio, 24 How. 66, 103.

⁴ State v. Adams, 4 Blackf. 146; State v. McBride, 1 Rice, 400; People v. Kelly, 38 Cal. 145; State v. Tuller, 34 Conn. 280; State v. Zulich, 5 Dutch. 409.

gress, is not punishable in a State court.¹ Nor can a State court punish a larceny committed by stealing a letter from the United States mail. So the United States courts have no jurisdiction over crimes committed against State laws.²

¹ See cases cited above. And, also, *ple v. Murray*, 5 Parker Cr. Cases, 577; *State v. Pike*, 15 N. H. 83.

² *State v. McBride*, 1 Rice, 400; *Peo-*

ple v. Murray, 5 Parker Cr. Cases, 577; *State v. Elder*, 54 Maine, 381.

CHAPTER XXIII.

THE POLICE POWER.

- I. THE POLICE POWER IS IN THE STATES.
- II. ITS EXTENT.
- III. THIS POWER REMAINED IN THE ORIGINAL STATES.
- IV. AND BY PARITY OF RIGHT IS IN THE NEW STATES.

I. THE POLICE POWER IS IN THE STATES.

The police power is in the States so far as regards their domestic police; but cannot be so regulated or exercised as to interfere with or fetter commerce, or to infringe upon the exclusive power of Congress to regulate commerce with foreign nations, and between the several States and with the Indian tribes.¹

II. ITS EXTENT.

It extends to the protection of the lives, limbs, comfort and quiet of all persons, and may exclude from introduction into the State contagious and infectious diseases; may make inspection laws; and may exclude or prevent the introduction of criminals, convicts, paupers, idiots, lunatics, and others likely to become a burden or public charge, so far as it may be exercised without interfering with the power of Congress over the subject of commerce, hereinbefore referred to.² The precise extent of this power, it is "difficult to define with sharp precision," but whatever invades the domain of legislating vested exclusively in

¹ *Railroad Company v. Husen*, 5 Otto, 465; *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140; *Northwestern Fertilizing Co. v. Hyde Park*, Chicago Legal News, Vol. XI. p. 81 (U. S. Supreme Court, October Term, 1878); *Patterson v. Kentucky* (U. S. Supreme Court, October Term, 1878), Chicago Legal News, Vol. XI. p. 183; *Gibbons v. Ogden*, 9 Wheat. 1; License

Cases, 5 How. 504; *Beer Company v. Massachusetts*, 7 Otto, —; *Cooley on Const. Lim.*, 4th Ed. 715.

² *Railroad Company v. Husen*, 5 Otto, 465; *Commonwealth v. Alger*, 7 Cush. 84; *Munn v. Illinois*, 4 Otto, 113; *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140; *Cooley on Const. Lim.*, 4th Ed. 713 *et seq.*

Congress is void, no matter how closely allied to powers belonging to the States.¹ It is well said, that as the range of this power sometimes comes very near to the field committed by the constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.²

The police regulations of a State requiring railroad corporations to fence their roads, or in default thereof to pay for injuries to live stock thereon, applies as well to foreign railroad corporations running lines of railroad in the State, as to local or domestic corporations. The fact that such statute can only be enforced within the State where enacted does not alter the case. A foreign corporation there operating a railroad is subject to the statute to the same extent as local corporations, and so the danger to the public is equally great from one and the other. The object is not only to protect the owners of live stock from loss, but also to protect the public, as passengers, from injuries resulting from accidents caused by running against and over live stock coming onto the roads. Such foreign corporations are not only within the act, but are suable in the State by service on their agents.³

III. THIS POWER WAS IN THE ORIGINAL STATES.

The police power belonged to the several original States of the Union, before and at the time of the adoption of the national constitution, and except in so far as its exercise by them may impair the right of Congress to regulate commerce as conferred by the constitution, it was not surrendered or taken away from the States by the adoption of the same.⁴

IV. AND BY PARITY OF RIGHT IS IN THE NEW STATES.

It follows that it exists in the new States to the same extent as in the old ones, from their admission into the Union on an equal footing with the old, or original ones.⁵

¹ Railroad Company v. Husen, 5 Otto, 465, 470, 472.

² Ibid.

³ Purdy v. New York & New Haven R. R. Co., 61 N. Y. 353.

⁴ Northwestern Fertilizing Co. v. Hyde Park, Chicago Legal News, Vol. XI. p. 81 (U. S. Supreme Court, October Term, 1878); Railroad Co. v.

Husen, 5 Otto, 465; U. S. v. Reese, 2 Otto, 214; U. S. v. Cruikshank, 2 Otto, 542; Patterson v. The Commonwealth (U. S. Sup. Ct., Oct. Term, 1878), XI. Chicago Legal News (Feb. 22d, 1879), p. 183; Cooley on Const. Lim., 4th Ed. 715.

⁵ *Supra*.

CHAPTER XXIV.

INTER-STATE RIGHTS, POWERS AND DUTIES OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

- I. WHERE LETTERS TESTAMENTARY AND OF ADMINISTRATION SHOULD BE GRANTED.
- II. THE POWERS, LIABILITIES AND DUTIES OF EXECUTORS AND ADMINISTRATORS ARE LOCAL.
- III. INTER-STATE ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS ON FOREIGN JUDGMENTS.
- IV. EXECUTORS AND ADMINISTRATORS SUING IN THEIR OWN RIGHT.
- V. NON-RESIDENCE AND REMOVAL FROM THE STATE.
- VI. STATUTORY POWER TO ACT IN OTHER STATES.
- VII. WILLS; PROBATE; VALIDITY OF. HOW FAR BINDING IN OTHER STATES.
- VIII. GUARDIANS OF MINORS AND LUNATICS.
- IX. DOWER.
- X. JURISDICTION OF NATIONAL COURTS IN INTER-STATE PROBATES.
- XI. PLEADINGS IN INTER-STATE SUITS IN PROBATE MATTERS.

I. WHERE LETTERS TESTAMENTARY AND OF ADMINISTRATION SHOULD BE GRANTED.

The Place of Domicile. The proper jurisdiction in which to obtain letters testamentary or of administration is in the State and place of the decedent's domicile, at the time of his death.¹

Ancillary Letters. If there be assets in another State or States, and administration be obtained there, such administration is *ancillary* to that of the administrator or executor acting as such at the place of the decedent's domicile, at and immediately preceding his death.²

Excess of Assets. But although it is a general principle that administration on a decedent's estate granted elsewhere than in

¹ Crosby v. Leavitt, 4 Allen, 410; Christy v. Vest, 36 Iowa, 285; Chamberlin v. Wilson, 45 Iowa, 149; 1 Williams on Executors, 495, *et seq.* 6th Am. Ed. top paging.

² Ibid. And see, also, Probate Court v. Kimball, 42 Vt. 320; Chamberlin v. Wilson, 45 Iowa, 149.

the State of decedent's domicile is regarded as ancillary to the administration of the domicile, yet it is nevertheless the law that it is so only as to the excess of assets over what satisfies domestic creditors; and inasmuch as every State has the right of directing by law the disposition of property therein, therefore property in a State belonging to a non-resident is, on his decease, subject to be disposed of under the laws of the State, and to be sold, in case of insolvency of the estate therein, notwithstanding the estate be solvent in the State where the decedent died, for the creditors are not bound to look for payment in a foreign jurisdiction.¹

Void Letters. If administration or letters testamentary be granted of a deceased person's estate in a different State than that of his last and true domicile, and there are no assets of the deceased in the said State or jurisdiction in which the letters are thus obtained, then such letters and authority are totally void,² for there is no property or interest of the deceased therein to confer jurisdiction on the court, or to grant administration or testamentary letters upon.

It is well settled that an administrator of a deceased person cannot be appointed by a court of a State other than that of his domicile at his death, if in such other State he left no estate.³ And the fact that at his death he was defendant in an attachment suit in another State, wherein property of his was attached and in the custody of the law, will not alter the case when such property has been receipted for to account to the officer and removed to the place of domicile in another State. The appointment of an administrator where the suit is pending, and rendition of judgment in such suit against him under such circumstances, are equally void.⁴

Surplus of Assets to be Turned Over to Principal Administrator or Executor by Ancillary Administrator. If there be ancillary administration also, that is administration in some

¹ *Gilchrist v. Cannon*, 1 Cold. 581; *Goodall v. Marshall*, 11 N. H. 88; *Churchill v. Boyden*, 17 Vt. 319; *Stevens v. Gaylord*, 11 Mass. 256. And see, also, Perkins' note to Williams on Executors, vol. III., p. 1763, 6th Am. Ed. See, further, *Mincer v. Austin*, 45 Iowa, 221.

² *Christy v. Vest*, 36 Iowa, 295.

³ *Crosby v. Leavitt*, 4 Allen, 410; *Miller v. Jones*, 26 Ala. 247; *Grimes v. Talbert*, 14 Md. 169; *Thumb v. Gresham*, 2 Met. (Ky.) 306; *Broughton v. Bradley*, 34 Ala. 694; *Jeffersonville R. R. Co. v. Swayne*, 26 Ind. 447.

⁴ *Crosby v. Leavitt*, 4 Allen, 410.

other State than that of the decedent's domicile, in which other State there are assets, then this ancillary administration is servient to the other, which other is the principal administration, and, therefore, when local claims, liens and legacies of a local character are satisfied out of the assets, as also costs and charges of administration, the residue of the estate in the hands of the ancillary administrator will be required, by the court, as a usual course, to be handed over to the administrator of the domicile for distribution under the law thereof.¹ Payment of a debtor to a foreign administrator will not discharge him from the debt.²

II. THE POWERS, LIABILITIES AND DUTIES OF EXECUTORS, ADMINISTRATORS AND GUARDIANS ARE LOCAL.

Are Local to the State wherein Granted. The rights, powers and duties of administrators of deceased persons are co-extensive only in a territorial point of view with the territorial boundaries of the State in which their letters testamentary, or letters of administration, are obtained; they do not, in law, extend beyond such jurisdiction, or into that of any other State or States, by virtue of their own force, or in virtue of the force or power of the government or laws, from which such letters emanate. They do not confer without more a right or title to property, although it be of a personal or movable nature; nor right of property or control of any interests, or debts, or choses in action, so situated within other States, or power to release, transfer, or discharge the same; nor right to institute and maintain in their official or fiduciary capacity any action or suit in the courts of another State or States, than the one where such letters are granted; and, therefore, no such powers or authority can be exercised by such administrators outside of the local jurisdiction of the State from which their powers are obtained, or over property or rights situated outside of such local jurisdiction, by mere force of their respective original letters or grant, but can only be exercised and enforced by them in such other State, by virtue of authority of law existing in such other State or States, if such law there be, permitting the exercise of such powers and conferring such rights upon administrators of other States;³ and if there be no

¹ Probate Court v. Kimball, 42 Vt. 320; Low v. Bartlett, 8 Allen, 259; Ela v. Edwards, 13 Allen, 48.

² Young v. O'Neal, 3 Sneed, 55.
³ McClure v. Bates, 12 Iowa, 77; Karrick v. Pratt, 4 G. Greene, 144;

such law in such other State, then letters of administration must be had therein, in accordance with the laws thereof, to confer the right of property, or control of property, of the decedent, or right of action in regard thereto, in the courts of such other State, upon an administrator of the deceased; and, in so doing, the administrator to whom grant of letters is made in such other State must execute bonds therein and take the oath of office, and otherwise comply with all the requirements of the local laws there in force, irrespective of any action in that respect which may have been had in any other State or States, and this, too, whether the persons to whom the grant is made be the same persons to whom letters had before issued in the State where first granted, or be a different person or persons.¹

Some Exceptions in Louisiana. In Louisiana, however, it is held that the title of an administrator being legal at the *domicile* of the deceased, confers on the possessor power to pursue and recover the property, if abstracted from his possession and carried into other jurisdictions or States.²

Not Liable to Suits in other States. Administrators and executors are not liable to suit in any other jurisdiction, sovereignty or State than the one in which their authority is granted, for assets coming into their hands lawfully in their fiduciary capa-

Picquet v. Swan, 3 Mas. 469; Vaughan v. Northup, 15 Pet. 1; Smith v. Webb, 1 Barb. 231; Vermilya v. Beaty, 6 Barb. 429; Doe v. McFarland, 9 Cr. 151; Young v. O'Neal, 3 Sneed, 55; Henderson v. Rost, 15 La. Ann. 405. Nor can a public administrator of one State maintain a suit in the courts of such State on a policy of insurance issued by an insurance company of another State. His powers and duties are confined to assets and rights found in the jurisdiction where his letters are granted. Union Mut. Life Ins. Co. v. Lewis, U. S. Sup. Court, Chicago Legal News, vol. XI. p. 139, (1878). See, also, 1 Williams on Executors, 419, 6th Am. Ed. note u.

¹ Smith v. Union Bank of Georgetown, 5 Pet. 518; Campbell v. Tousey, 7 Cow. 64; Fenwick v. Scars, 1 Cr.

259; Kerr v. Moon, 9 Wheat. 565; Dixon v. Ramsay, 3 Cr. 319, 323; Armstrong v. Lear, 12 Wheat. 169; Dickinson v. McCraw, 4 Rand. (Va.) 158; Thompson v. Wilson, 2 N. H. 291; Glenn v. Smith, 2 Gill & J. 493; Goodwin v. Jones, 3 Mass. 514; Borden v. Borden, 5 Mass. 67; Stearns v. Burnham, 5 Greenl. 261; Stevens v. Gaylord, 11 Mass. 256; Langdon v. Potter, 11 Mass. 313; Riley v. Riley, 3 Day, 74; Trecothick v. Austin, 4 Mas. 16; Dangerfield v. Thruston, 20 Martin, 232; Holmes v. Remsen, 20 John. 229; McClure v. Bates, 12 Iowa, 77; Karrick v. Pratt, 4 G. Greene, 144. See, also, 1 Williams on Executors, 419, 6th Am. Ed. note u.

² Crawford v. Graves, 15 La. Ann. 243.

city. Every grant of the kind is strictly confined in its authority and operation to the territorial limits of the government from which it emanates, and does not *de jure* extend to other States. There is no power, by *virtue of it*, to control or collect assets of the deceased in other States than that wherein the grant is obtained. Any authority accorded to it elsewhere, that is, in other States or countries, is done as mere matter of comity, which may be extended or withheld by all other States, according to their internal policy and pleasure. Such administrator or executor is bound to account for his trust to the tribunal of his appointment, and those of other States may not interfere with the application of those assets that come to their hands, but the same are exclusively subject to the law and the tribunal of the place where the letters of administration or testamentary are granted. Nor can he be sued as such in any other State, if there found, so as to be served, either for what may have come into his hand as such administrator or executor, by heirs or legatees claiming distribution, or by creditors of the deceased, for purposes of establishing their debts against the estate or administration. Such are the settled principles of the law.¹ The right to sue in other States is often exercised, but this, either by compliance first with some local law conferring the authority, or else in virtue of mere comity, indicated by the local law and practice in the courts of such other State.²

Suit in Administrator's or Executor's own Right. Although executors and administrators cannot, at common law, in mere

¹ *Vaughan v. Northup*, 15 Pet. 1; *Fenwick v. Sears*, 1 Cr. 259; *Dixon v. Ramsay*, 3 Cr. 319; *Kerr v. Moon*, 9 Wheat. 565; *Security Ins. Co. v. Taylor*, 2 Biss. 446; *Sparks v. White*, 7 Humph. 86; *Brown v. Brown*, 4 Edw. Ch. 343; *Brookshire v. Dubose*, 2 Jones Eq. 276; *Noonan v. Bradley*, 9 Wall. 394; *Beckham v. Wittkowski*, 64 N. C. 464; *Sayre v. Helme*, 61 Penn. St. 299; *Swatzel v. Arnold*, 1 Woolw. 383; *Riley v. Moseley*, 44 Miss. 37; *Stone v. Scripture*, 4 Lans. 186; *Pond v. Makepeace*, 2 Met. 114; *Cutter v. Davenport*, 1 Pick. 81; *Goodwin v. Jones*, 3 Mass. 514. But they may on

a judgment obtained by them in a foreign State, inasmuch as they need not allude to their fiduciary capacity. *Talmage v. Chapel*, 16 Mass. 71; *Graeme v. Harris*, 1 Dall. 456; *Naylor v. Moody*, 2 Blackf. 247; *Perkins v. Williams*, 2 Root, 462; *Smith v. Webb*, 1 Barb. 231; *Boyd v. Lambeth*, 24 Miss. 433; *Kirkpatrick v. Taylor*, 10 Rich. L. 393; *Naylor v. Moffatt*, 29 Mo. 126; *Vickery v. Beir*, 16 Mich. 50. See, also, 1 *Williams on Executors*, 419 *et seq.*, 6th Am. Ed. note *u.*, where this subject is very thoroughly discussed.

² *Supra*.

virtue of the office, bring suits in the courts of States other than the one wherein the letters are granted, but must take letters anew, or otherwise conform to the law of the State where suit is intended to be brought; yet, when an executor or administrator has been regularly made plaintiff in a judgment recovered by the deceased during his lifetime, by substitution of record in the State where his letters are granted, and such judgment is obtained, then such executor or administrator may sue upon such judgment in courts of other States, without taking out letters testamentary or of administration therein, for the right of action attaches to the person, and not to the office, after judgment, and he may sue thereon, although his right be a trust, just as any other trustee may sue in a State other than that of his residence or citizenship. ¹

Local Letters Procured after Suit Commenced. Though an administrator appointed by the court of one State or territory cannot ordinarily sue, as such, in the courts of another State or territory, without taking like letters therein, or in some way bringing himself within the statutory provision, if any there be, of the latter State, permitting the same,² yet if after suit actually commenced he procure letters of administration in the State wherein the suit is pending, that fact may be brought before the court, and suit will be allowed to proceed.³

The proper method of showing such subsequent grant of administration, according to the rules of pleading and practice, is by a supplemental pleading; but if done by an *amendment*, so called, it may be sustained.⁴

The case of *Swatzel, Admr., v. Arnold*, here cited, was commenced in the district court of the *Territory* of Nebraska, by bill to foreclose a mortgage given to the complainant's deceased intestate, brought by Swatzel, acting in virtue of letters of administration granted to him in the then Territory of Kansas. The defendant demurred, alleging for cause of demurrer that complainant had not obtained administration in Nebraska. The demurrer was sustained. Subsequently the complainant obtained administration in Nebraska, and averred that fact by way of an amendment to his bill, filed by leave of the court. The plaintiff

¹ *Greasons v. Davis*, 9 Iowa, 219, 225.

³ *Swatzel v. Arnold*, 1 Woolw. 383.

² *Swatzel v. Arnold*, 1 Woolw. 383;

⁴ *Ibid.*

Dixon v. Ramsay, 3 Cr. 319.

was a citizen of the State of Missouri, and the defendant a citizen of Nebraska, so that when, at this stage of the proceedings, Nebraska became a State, the cause went into the circuit court of the United States for that district for trial. In the United States circuit court defendant demurred to the bill as amended, for the reason that the appointment as administrator in Nebraska was after proceedings commenced. In disposing of the demurrer the untimeliness of the appointment as administrator was not only urged, but it was contended, also, that the *amendment* was ineffectual to bring the *subsequent* appointment before the court; that a supplemental pleading was the required practice; but the court, MILLER, J., ruled against such necessity, conceding at the same time that the more approved or general practice had been a supplemental bill, in bringing before the court and into a cause facts or circumstances occurring after the filing of the original bill. The court cited, in support of the allowance of the practice by *amendment*, Story's Equity Pleadings¹ and *Humphreys v. Humphreys*,² from which it seems that such is sometimes the practice, as in case of this amendment *before answer filed*. The objection for want of local letters of administration, when the foreign letters are granted in the State of the late *domicile* of the decedent, goes to the *capacity* to sue, and not to the *right* of the administrator to the subject matter of the suit;³ for that is well settled, that a payment voluntarily made to the administrator of the *domicile* by a foreign debtor is a good acquittance of such foreign debt.⁴

The court, in *Swatzel, Admr., v. Arnold*, lay down the rule that the administrator of the *domicile* had an inchoate right to appointment in such other State in which there were assets, and that a local administrator then appointed would be required, after satisfying local claims and costs, to pay over the residue of the assets to the administrator of the *domicile*.⁵

¹ § 885.

² 3 P. Wms. 349.

³ *Swatzel v. Arnold*, 1 Woolw. 383, 388, 389.

⁴ *Swatzel v. Arnold*, 1 Woolw. 383, 389, citing *Lewis v. Doolittle*, 7 John. Ch. 45; *Dawes v. Head*, 3 Pick. 128; *Stevens v. Gaylord*, 11 Mass. 256; *Davis v. Estey*, 8 Pick. 475; *Harvey v.*

Richards, 1 Mas. 381. See, also, *Mackey v. Coxe*, 18 How. 100, 104.

⁵ *Swatzel v. Arnold*, 1 Woolw. 383, 388, and citing *Stevens v. Gaylord*, 11 Mass. 255; *Harvey v. Richards*, 1 Mas. 381; *Burn v. Cole*, 1 Ambl. 415; *Sommerville v. Sommerville*, 5 Ves. 751, 791. See, also, *Probate Court v. Kimball*, 42 Vt. 320.

Inability Removed as to District of Columbia. But this inability to sue in courts of other States and jurisdictions than those of the States in which their letters testamentary or of administration are obtained has been so far removed as to give the right to sue in the courts of the District of Columbia, by act of Congress of June 24, 1812, which provides "that it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted by the proper authority in any of the United States, or the territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or administration had been granted in the District."¹

Ancillary Administration. An appointment made where there is property of a decedent subject to administration, and at a place in a different State than that of the domicile of the deceased, if of the same person who is administrator in the State of the domicile, is merely ancillary to the administration of the domicile,² and accountability will not be required of such ancillary administrator, at the place of such appointment, for assets coming to his hands in the jurisdiction of the principal administration. Nor will suit lie against him in the jurisdiction or State of the ancillary appointment for debts, by creditors or by heirs or legatees, to be paid or distributed out of the assets received and accountable for in the State where is made such original or principal grant of administration.³

Distribution. Distributees and legatees must look to the *forum* of administration in the State of the decedent's domicile, where there are two such administrations granted to the same person, unless otherwise directed as to the local assets, in the discretion of the court where ancillary administration exists.⁴

Assets First Liable to Local Claims. But such assets are first liable to the local creditors and debts within the jurisdiction or

¹ Mackey v. Coxe, 18 How. 100, 103.

² Porter v. Heydock, 6 Vt. 374.

³ Selectmen of Boston v. Boylston, 2 Mass. 381; Hapgood v. Jennison, 2 Vt. 294; Probate Court v. Matthews, 6 Vt. 269, 275. See, for a full discussion of this subject, 1 Williams on

Executors, 419, *et seq.*, note *u*, 6th Am. Ed.

⁴ Hapgood v. Jennison, 2 Vt. 294; Richards v. Dutch, 8 Mass. 506; Dawes v. Boylston, 9 Mas. 337, 356; Harvey v. Richards, 1 Mass. 381, 408; 1 Williams on Executors, 419, note *u*, 6th Am. Ed.

State wherein they are thus administered, and the residue only will be turned over for distribution at the *forum* of the decedent's domicile.¹

Establishing Claims of Creditors and Payment Thereof. When a decedent's estate is being administered in different States the creditors may proceed in the court of either of the States to establish and obtain payment of their claims, but if the estate is unable to pay in full all the claims for which it is liable, no one of the creditors can obtain a larger payment than his *pro rata* share, or dividend, although his claim be allowed in the courts of both States; any amount paid in one State will be deducted from his payments as for the whole claim made to him in another.²

Order of Payment of Foreign Judgments. In State laws declaring the order of payment in probate of a decedent's debts, the term "judgments" will not be construed to include foreign judgments—that is, judgments existing in another State and not put into judgment in the State wherein the assets are being administered. Such judgments of other States, though entitled to full faith and credit under the constitution and laws of the United States are not judgments of such other States, and though not liable there to any objection as to validity as evidence of a debt, but such objections as would invalidate them in the State where rendered are not of the same grade in other States with domestic judgments. The latter are liens, in certain cases, whereas the former cannot be in the nature of things. To allow them equality of grade would be to divide with them the proceeds of judgment liens existing under domestic judgments, thus displacing in part the priority of lien of such domestic judgment.³

Public Administrator. The case cited of *Union Mutual Life Insurance Company v. Lewis, Public Administrator of St. Louis county, State of Missouri*, decided by the supreme court of the United States, at the October term, 1878, grew out of a life policy issued by said company, a corporation of the State of Maine, to one William Burton, of Milwaukee city and county,

¹ Goodall v. Marshall, 11 N. H. 88; Richards v. Dutch, 8 Mass. 506; Low v. Bartlett, 8 Allen, 259; Churchill v. Boyden, 17 Vt. 319. And, see *supra*.

² Loomis v. Farnum, 14 N. H. 119; Goodall v. Marshall 11 N. H. 88; Tylor v. Thompson, 44 Tex. 497.

³ McElmoyle v. Cohen, 13 Pet. 312.

in the State of Wisconsin, and who died in said city of Milwaukee, and never having resided in the State of Missouri, and who had no money, property, paper, or other estate therein. The Insurance Company having an agent in St. Louis, on which process was had under the statute of Missouri, the public administrator assumed to bring an action on the said life policy in a State court of Missouri against said company. The suit was removed to the United States circuit court, and judgment of said court was rendered against the company, and thereupon the company, as plaintiff in error, carried the case to the supreme court of the United States. The supreme court held that the powers of such public administrator, as an officer of the State of Missouri, were local, and confined to the matters confided to him by the local or State law, and did not extend to such a case. That court say, HARLAN, J.: "It was not the purpose of the statute to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there upon the contract; not made or to be executed in that State with a citizen of another State who neither resided, nor died, nor left any estate in Missouri. Without discussing the validity of any local statute framed for such purposes as are imputed by this action to the Missouri statute of 1868, it is sufficient to say, that the present case is not within the statute, according to any reasonable interpretation of its provisions."

III. INTER-STATE ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS ON FOREIGN JUDGMENTS.

Action of Debt on Judgment. It seems to be a well settled principle of the law, that an action of debt will not lie against an administrator in one State, on a judgment obtained in another State, against a different administrator of the same intestate appointed under authority of such other State.¹ An administrator cannot do any act that will affect or control the assets which are in another State, inasmuch as his own authority cannot extend beyond the authority or jurisdictional limits of the government from which he receives it. Where there are two

¹ *Stacey v. Thrasher*, 6 How. 44; *Chenowith*, 7 Ind. 211; *Low v. Bart-Aspden v. Nixon*, 4 How. 467; *Mclett*, 8 Allen, 259; *Ela v. Edwards*, 13 *Lean v. Meek*, 18 How. 16; *Slauter v. Allen*, 48.

such administrations, they are equal and independent of each other within their respective jurisdictions, if there be no local law to the contrary.¹ It is, to some extent, different as between executors of the same testator, some of whom reside in one State, and others in another, and all appointed by the same will, but each qualifying only in the respective States where they reside, and so, also, if one is administrator with the will annexed.² In such case, it is said that although in a suit against the executor in one State on a judgment obtained in another State, and although the judgment be not *conclusive*, yet it may properly be the basis of an action and go in evidence; since although there is no privity in law, between *administrators* of a common intestate, in different States, as they take their authority exclusively from the laws, there is, however, a privity of right and official identity between executors, inasmuch as their interest and powers emanate from their *testator*, and that judgment against one in one State may be rightfully brought into administration in the other State by proper proceeding against the executor locally existing there; and that if not a subject matter of recovery in itself in such other State, yet it may go in evidence, when the suit includes also the original demand, on which such judgment was rendered, to show that such demand has been carried into judgment in another State against one of the executors, qualified in such other State, and that therefore the other executors are precluded by reason of such judgment from pleading prescription, or the statute of limitations, in reference to the original cause of action, when such judgment in another State, is held, by the courts of the *forum* to preclude prescription, or the running of the statute.³ For the better understanding of the case cited, it may be proper to remark that the suit embodied not only judgment against the executor, but also one rendered against the testator in his lifetime, as also on several bills or notes not negotiable instruments, and that by the law of Louisiana where the action was tried, prescription, as there called (statutes of limitations), does not run against non-negotiable paper, and this circumstance is also referred to as in part the ground of the decision of the

¹ Stacey v. Thrasher, 6 How. 44; Aspden v. Nixon, 4 How. 467; McLean v. Meek, 18 How. 16.

² Hill v. Tucker, 13 How. 458; Latine v. Clements, 3 Kelly 426.

³ Hill v. Tucker, 13 How. 458; Goodall v. Tucker, 13 How. 469.

Supreme Court of the United States.¹ That court say, WAYNE, J.: "When, then, the court below rejected, as inadmissible in evidence in this case, the judgment obtained in Virginia against Allen and Johnson, the executors of Robinson in that State, we think it erred, and that it should have been admitted for the purpose mentioned. The court also instructed the jury, that the causes of action in this suit against Tucker, the co-executor of Allen and Johnson, were barred by prescription. In this we think there was error. The article of her code (the Louisiana code) upon which that instruction was given, 3,505, is in these words: 'Actions on bills of exchange, notes payable to order or bearer, except bank notes, those of all effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when these engagements are payable.' It is not applicable to either of the causes of action set out in the plaintiff's petition." And that as to the one note put into judgment in the testator's lifetime, it estops the executors and obliges them to pay it out of his assets wherever they may be; and so, too, if administrators (instead of executors), in different States, as administrators, in whatever State appointed, are privy to the intestate and are estopped by judgment against him.²

IV. EXECUTORS AND ADMINISTRATORS SUING IN THEIR OWN RIGHT.

May Sue in Their Own Personal Right. But notwithstanding a foreign executor or administrator, in the absence of any statute to the contrary, must take out letters in another State to enable him to sue therein, yet such necessity does not exist in reference to an executor who sues in another State, for lands therein, devised to himself in the will of his testator, for such executor's right is derived from the will, and therefore letters testamentary are not required to give him title as in the case of an administrator suing for personalty.³

Division of a State. And if, after such will is duly recorded in the State where made and wherein the testator died, a portion of the State be erected into a new and different State, it is not necessary to the validity of the will as to lands situated in such

¹ Hill v. Tucker, 13 How. 468.

² 13 How. 467, 468.

³ Lewis v. McFarland, 9 Cr. 151, 153.

new State that it be subsequently recorded therein.¹ And so, too, in Maryland and other of the States, a foreign executor may enforce by suit in his own name, in the State court, a judgment of a court of another State recovered by him, as such executor where his letters testamentary were granted, and may also recover upon liabilities created to himself;² although the rule exists there as generally elsewhere, that a foreign executor or administrator cannot by mere force of such foreign authority act as such, or administer the assets of his decedent in said State;³ for the courts or laws of one State cannot confer authority of an official or fiduciary character to be exercised over property in another State. Laws have no extra-territorial force in themselves;⁴ but such authority may be exercised in other States if permitted by the laws thereof.⁵ Thus, under the statute in Pennsylvania allowing the sale and transfer of capital stocks of a decedent, by his executor, upon registration by him of the will in the proper office in Pennsylvania, duly probated in the court of another State where decedent resided at the time of his death, it is held that a foreign executor may make such sale or transfers of stocks of Pennsylvania corporations, and that the corporation is not under the necessity of ascertaining if the will confers such power, for the power is derived from the local law.⁶

When a foreign executor or administrator sues upon a judgment of another State rendered in favor of himself, he sues in his own right, for that which is his own in his representative character, as was held in the case cited above;⁷ for although such judgment may have been rendered on a demand due the estate, yet that demand is merged in the judgment, and the debt is then due to him, and may be enforced by him, although held by him in his trust character.⁸

¹ *Lewis v. McFarland*, 9 Cr. 151, 153.

² *Barton v. Higgins*, 41 Md. 539. And they need not, in such suit, aver probate of the will, either in the courts of such other country or of the State where suit is brought. *Leland v. Manning*, 4 Hun, 7; *Smith v. Webb*, 1 Barb. 230; *Trotter v. White*, 10 S. & M. 607; *Lawrence v. Lawrence*, 3 Barb. Ch. 71; *Hall v. Harrison*, 21 Mo. 227; *Wayland v. Porterfield*, 1 Met. (Ky.) 638.

³ *Sheldon v. Rice*, 30 Mich. 296; *Turner v. Linam*, 55 Geo. 253.

⁴ *Sheldon v. Rice*, 30 Mich. 296.

⁵ *Williams v. Pennsylvania R. R. Co.*, 9 Phila. 298; *Turner v. Linam*, 55 Geo. 253.

⁶ *Williams v. Pennsylvania R. R. Co.*, 9 Phila. 298.

⁷ *Wayland v. Porterfield*, 1 Met. (Ky.) 638.

⁸ *Ibid.*

Assignee of Executor or Administrator. Suit By. And so, too, where an executor duly qualified to act as such, assigns to a person a promissory note belonging to the deceased at his death and payable to such decedent, the assignee of the note may sue the maker thereof in another State without the necessity of letters testamentary or of administration being had in such latter State, or of any other thing preliminary to his right of action therein upon such note, if by the law of the *forum* actions are maintainable by the assignees of promissory notes. For by the assignment the personal ownership of the instrument passes to the assignee, and to sustain an action thereon he need only show fiduciary character of the assignor as executor by the proper record of his appointment of the will, and make proof of the assignment.¹

Note Payable to Bearer. Suit on. Likewise an administrator, whether foreign or domestic, may maintain suit in his own name although it be with the additional description of administrator, on a promissory note payable to bearer, and although the administrator's intestate owned the note at the time of his death; and in such case he may make judgment without proof of his representative capacity as administrator, for that is mere matter of description and is immaterial, inasmuch as being the holder of the note so payable to bearer, he is thereby vested with its legal ownership, and might sue in his individual name without reference to his fiduciary character of administrator.²

In the language of Justice LYONS, in *Sanford v. McCreedy*, "in such case it was entirely unnecessary that the plaintiff should state in his complaint the source from whence he derived title to the note; and, having stated it, it was not incumbent upon him to prove it. The mere production of the note on the trial was sufficient *prima facie* to entitle him to judgment."³

V. NON-RESIDENCE AND REMOVAL FROM THE STATE.

Removal from the State. The powers of an executor who has duly qualified and is authorized to act, are not vacated or suspended by his removal from the State, if there be no statute giv-

¹ *Harper v. Butler*, 2 Pet. 239.

² *Sanford v. McCreedy*, 28 Wis. 102, 106; *Brooks v. Floyd*, 2 McCord, 364; *Patchen v. Wilson*, 4 Hill, 57; *Rob-*

ertson v. Crandall, 9 Wend. 425; *Bright v. Currie*, 5 Sandf. 433.

³ 28 Wis. 106.

ing such effect to his removal out of the jurisdiction.¹ And by a parity of reasoning we suppose the rule equally applicable to administrators, under like circumstances.

The case just cited, *Griffith v. Frazier*, was one in which the question arose in this way: An executor duly appointed and qualified in South Carolina, where he resided, removed from the State after his appointment and qualification. The ordinary, in whom resided the probate powers, regarded the removal of the executor from the State as having the effect of vacating his office, and thereupon assumed to appoint another in his stead. The supreme court of the United States, MARSHALL, C. J., said, in delivering the opinion: "The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing; it conveys no right, and is a void act. If the ordinary possesses no power to grant administration where an executor is present performing his duty, what difference can his absence make, provided that absence does not disqualify him from executing his trust? * * * It would seem that he is *potentially* present, though personally absent."

In this case a judgment had been revived, and execution sale thereon was made, in proceedings against the administrator thus illegally appointed, which gave rise to the suit, as involving the validity of the sale. The judgment and sale were adjudged void.

If there is no law of the State requiring an administrator to be a resident of the State wherein letters of administration are granted, then his removal therefrom and becoming a citizen of a different State, after the granting of his letters, does not vacate or affect the validity of the same.

Suit in United States Circuit Court. Every citizen has a right to change his citizenship from one State to another at pleasure, and if, having obtained administration of the estate of a decedent from the courts of a State in which he at the time resides,

¹ *Griffith v. Frazier*, 8 Cr. 8, 22.

he afterwards removes his residence into another State and become a citizen thereof, his right as administrator to sue a citizen of the State of his former residence for liabilities due his decedent in the circuit court of the United States for the district wherein the person sued resides, is not affected by the fact that his legal capacity as administrator is the creature of the State wherein the suit is brought. The right so to sue is a personal one, and the capacity of administrator being attached to the person of the plaintiff does not take it away.¹ And it does not matter, to the contrary, that the intestate was a citizen of the same State with the defendant and if still alive could not sue in the Federal court; nor is the *status* of the parties altered as to the place of suit by the fact that the creditors or legatees of the decedent are citizens of the same State with the defendant.² The legal interest in the *choses in action* of a decedent who died intestate is conferred on his administrator by virtue of appointment as such, and therefore his personal right of suing in the Federal court is in no wise affected by that right having come to him through the State court of the State wherein he sues in a court of the United States.³

VI. STATUTORY AUTHORITY TO ACT IN OTHER STATES.

Statutory Authority in Other States. In some of the States foreign executors and administrators may sue by virtue of the local statute, either unconditionally, as in actions by individual persons, or else under such terms as the statute prescribes.⁴ In Ohio such statutory right exists, and letters properly authenticated under the act of Congress are evidence of such fiduciary capacity.⁵ In Illinois such statutory right exists.⁶ So, also, in New Jersey.⁷

Foreign Executors and Administrators, Suit by. In Wisconsin, where there is a statute allowing foreign executors or administrators of deceased persons, who were not at their death residents

¹ Rice v. Houston, 13 Wall. 66.

² Rice v. Houston, 13 Wall. 66; Coal Co. v. Blatchford, 11 Wall. 172; McNutt v. Bland, 2 How. 9; Browne v. Strode, 5 Cr. 303; Chappedelaine v. Dechenaux, 4 Cr. 306; Childress v. Emory, 8 Wheat. 642, 669; Osborn v.

Bank of United States, 9 Wheat. 738.

³ Rice v. Houston, 13 Wall. 66.

⁴ Price v. Morris, 5 McLean, 4.

⁵ Ibid.

⁶ R. S. of Ill. 1874, § 42, p. 112.

⁷ Rev. of 1877, § 23, p. 757.

of the State, to bring suits in the courts of said State on filing in the probate court of the county where suit is to be brought a copy of their authority to act as such, it is held that before the filing thereof, their inability to sue is mere matter of *disability*, and not of *right*, and that therefore no new letters are necessary to confer a right to the subject matter of the suit involving assets, since such right inures to the executor or administrator by virtue of his foreign appointment;¹ and that such disability may be cured after action brought,² and can be taken advantage of by plea in abatement only.³

Where, by the statute of a State, foreign executors and administrators are allowed to sue in its courts, their authority to act as such is determinable by the laws of the State wherein they profess to have been appointed.⁴

VII. WILLS; PROBATE; VALIDITY OF. HOW FAR BINDING IN OTHER STATES.

The probate and establishment of wills duly done and perfected in the court of the proper jurisdiction of one State is valid and binding in the courts of every other State, when collaterally brought in question, so long as the record thereof remains in force;⁵ except as affecting the title to real estate lying in such other State, in which case the will must be established in accordance with the laws of the State where the land is situated.⁶ But when the law of the locality allows probate in accordance with the laws of another State, and in such other State, or the witnessing and execution thereof, in accordance with the laws of any other State wherein the same is made, than a compliance therewith is essentially a compliance with the law where the land is situated.⁷

Federal Courts Cannot Take Proof of Wills. The federal courts, having no power to make probate of wills, are bound by

¹ *Smith v. Peckham*, 39 Wis. 414, 418.

² *Smith v. Peckham*, 39 Wis. 414, 418; *Sabine v. Fisher*, 37 Wis. 376.

³ *Smith v. Peckham*, 39 Wis. 414, 418.

⁴ *Newton v. Cocke*, 5 Eng. 169.

⁵ *Gaines v. New Orleans*, 6 Wall.

642, 704; *Gaines v. Hennen*, 24 How. 553, 615.

⁶ *Kerr v. Moon*, 9 Wheat. 565.

⁷ *Secrist v. Green*, 8 Wall. 744; *Car-penter v. Dexter*, 8 Wall. 513, 531; *Cheever v. Wilson*, 9 Wall. 108; *Pennington v. Gibson*, 16 How. 65, 80; *Langdon v. Goddard*, 2 Story, 267.

the action of the State courts in that respect, and cannot entertain an original bill to review or set aside the probate of a will as having been done contrary to law.¹

State Courts. The jurisdiction of probate of wills belongs exclusively to the courts of the several States and territories.²

When Wills Probated in Other States are Evidence. Wills probated in another State, according to the laws thereof, are evidence, except as to the realty, in the courts of States where the record of such probate is produced and offered therewith, duly authenticated according to the laws of Congress of 1790 in reference to proof of records and judicial proceedings of States in courts of others of the States.³ But to operate on the title to lands, they must be executed and probated according to the laws of the *forum* where thus offered in evidence, or must otherwise satisfy the requirements of the local law.⁴

Devise to Minors. In Louisiana, a devise by a foreign testator, established in another State, of property situated in Louisiana, to minors resident therein, and who are under the tutorship or guardianship of their parents, will be administered by such guardians, under the usual supervision of the proper court, notwithstanding a provision in the will appointing or requiring to be appointed special functionaries to control and manage the property during the nonage of the devisees. For although such foreign bequest is conclusive to confer the title of the testator to property in said State, when properly established,⁵ yet it cannot alter or change the legal or practical manner of administering the same which is provided by the laws of Louisiana. So much of the will as seeks to thus provide a practical means of administering the property different from that of the law of the *forum* will be regarded simply as if never made.⁶ Nor can an executor of a foreign testator execute his office in Louisiana under the will, or under foreign appointment. This authority must emanate from the local court of the State.⁷

¹ Fourvergne v. New Orleans, 18 How. 470.

² Langdon v. Goddard, 2 Story, 267.

³ Newman v. Willett, 52 Ill. 98; Ap-
person v. Bolton, 29 Ark. 418.

⁴ Potter v. Titcomb, 22 Maine, 300;
Ives v. Allyn, 12 Vt. 589; Helms v.
Rookesby, 1 Met. (Ky.) 49.

⁵ Succession of Butler, Chi. Legal
News, Vol. XI., 52, (Sup. Ct. of La.)

⁶ Succession of Fourcher, Marquise
de Circe, Chi. Legal News, Vol. XI.,
p. 52. (Sup. Ct. of La.)

⁷ Succession of Butler, Chi. Legal
News, Vol. XI., p. 52.

To Pass Lands in Another State. Although, as a general principle, to pass lands in another State, a will must be made and evidenced in accordance with the law of the State wherein the lands are situated, yet where, in such State of the *loci rei*, there is a statute declaring that wills devising land in such State, but executed abroad, and proved according to the laws of the country in which executed, and so duly certified under seal of the court or officer taking the proof, and properly authenticated under the act of Congress, shall be admitted, and shall be of force in the State where the lands lie, and shall be good and sufficient evidence therein to pass real estate under such devise, then compliance with the manner of local proof and execution of wills is not required, but such foreign will passes the title as would a regularly executed and proven local will.¹

Execution of Wills. Real Estate. The sufficiency of a will, and of its execution, as also the capacity of the testator to make it, so as to pass real estate devised therein, depends upon the law of the State wherein the property is situated.² And in Missouri, it is held that when a will is made and executed, proven and recorded in another State, in the same manner required by the laws of Missouri, then a copy thereof, duly authenticated and recorded in Missouri, in the proper office, is sufficient evidence to pass real estate.³

VIII. GUARDIANS OF MINORS AND LUNATICS.

Minor's Domicile. The *domicile* of a minor is that of his place of nativity, until changed by his guardian or parents.

Custody of Ward. Therefore, as between a guardian appointed at the place of his original domicile and one appointed in another State, there being no other cause for a different course, the custody of a child will be decreed to the guardian of the original *domicile*, and the jurisdiction of a court of general jurisdiction to control the custody of such child, and decide the question, is not impaired by an order appointing a guardian, but is paramount thereto.⁴

Guardians' Powers Local. The rights and powers of guardians

¹ Doe v. Woody, 4 McL. 75.

³ Applegate v. Smith, 31 Mo. 166.

² Applegate v. Smith, 31 Mo. 166; Story's Conf. of Laws, § 474.

⁴ Woodworth v. Spring, 4 Allen, 321.

are local, and cannot be exercised over their wards in other States, except as permitted by the courts thereof.¹

Domicile Changes with that of the Parents. But although the domicile of a minor is the place of his birth, if that be the domicile of his parents, and so remains as long as they there reside, yet his domicile during his minority follows theirs, so that if theirs is changed, his is changed also.²

Marriage of the Mother. But on the death of the father, if the mother marries again, she has no such right of control of the minor children as will enable her to change their domicile into another State, where the laws of descent are different as to their property.³

Guardian of Lunatic. Where the same person is appointed committee of a lunatic in two different States, whose person was in one State, and whose whole property was in the other, and the appointment being first made in the State of the lunatic's domicile, it is held that the second appointment was but auxiliary to the other, and that the liability to account was in the court of the State of the first appointment;⁴ and that suit therein against a surety of the committee was maintainable for the assets by the administrator of the lunatic afterwards deceased.⁵

Suit by Lunatic. A lunatic may sue in another State by his next friend on a judgment recovered elsewhere.⁶

Guardians of Minors' Property. Courts of a State have power to appoint guardians of the property therein situated, belonging to minors who are residents of another State, and whose persons are not present in the State thus making such appointments. Jurisdiction of their persons is not essential to appointing guardians over their property which is within the jurisdiction of the court making the appointment.⁷

Decree and Sale of Lands Procured by a Foreign Guardian. Where, by statute, a foreign guardian is authorized to act as such, upon producing and filing record evidence of his appointment, and such evidence is accordingly filed as the statute requires, in the probate court of a State wherein the wards of

¹ *Woodworth v. Spring*, 4 Allen, 321.

² *Hart v. Lindsey*, 17 N. H. 235.

³ *Mears v. Sinclair*, 1 W. Va. 185.

⁴ *Commonwealth v. Rhoads*, 37 Penn. St. 60.

⁵ *Ibid.*

⁶ *Cook v. Thornhill*, 13 Tex. 293.

⁷ *Maxwell v. Campbell*, 45 Ind. 360.

such guardian have lands, then a decree of sale, and sale made, in such probate court, of the county where the lands are situated, is *prima facie* valid, and upon those persons undertaking to dispute the same devolves the *onus* of evidence to show the same to be inoperative or void.¹

Removal of Ward and his Property, by his Guardian, into another State. A guardian of a minor obtaining the property of his ward in the State wherein he is appointed, and then removing property and ward to another State so as to change the *domicile* not only of the minor, but of himself, is still accountable in the courts of the State into which he has thus removed his charge, for the property so brought into the State although he cannot exercise the powers of guardian therein by force of his appointment in the other State.² For though the guardian's power to act as such does not exist in the State into which he has thus come, yet the obligation of his trust continues, and the courts of such State will enforce it and not turn the ward over to the courts of another jurisdiction for a remedy when he is clearly invested with a right; the office of guardian having terminated by the change of residence and removal of the property, the minor thereby becomes entitled to have an account.³

Upon the principles of the civil law which in that respect prevails in Louisiana, the guardian having removed the property into a different State, wherein his guardianship does not exist, is nevertheless liable to account as exercising a species of agency, termed in that law, *Negotiorum gestor*, receiving at the same time a fair compensation by way of allowance for necessary expenses, if he has acted in good faith.⁴ Though a guardian appointed in one State may not be able to prosecute a suit in another State as such guardian and by virtue of his powers as such, yet if in the State where he is appointed, assets come to his hands in the shape of notes or obligations of persons in another State, it becomes his duty to look to them and make reasonable efforts of some sort to secure payment thereof or prevent their loss.⁵

¹ Farrington v. Wilson, 29 Wis. 333.

² Leverich v. Adams, 15 La. Ann. 310.

³ Ibid.

⁴ Ibid; 2 Moreau & Carleton's *Partidas*, 842, 843, 844, 845.

⁵ Potter v. Hiscox, 30 Conn. 508.

IX. DOWER.

The law of the domicile of the deceased husband, at the time of his death, determines as to the dower or portion of the widow in the personal estate of the deceased.¹ In regard to real estate, her right of dower will be measured by the *lex rei sitæ*, or law of the State where the lands lie.²

In Louisiana, where community of property exists as between the husband and wife, it is held that a husband and wife who were married, and spent their entire married life in another State, do not come within the law of Louisiana, which establishes community of property, or partnership interests, in gains acquired after marriage, although such property be acquired by the husband, within the State of Louisiana, and be so held until his death. The law of Louisiana, in that respect, applies only to married persons who reside in the State.³

Rights of Citizenship cannot change this rule. Nor does the provision of the constitution of the United States, which declares, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," enable persons thus living and dying in another State to claim the benefit of said law.⁴

X. JURISDICTION OF NATIONAL COURTS IN MATTERS OF PROBATE.

Jurisdiction Depends on Citizenship. Where the parties possess the necessary citizenship, circuit courts of the United States will take jurisdiction over executors and administrators, and adjust claims against them, upon the same rules which the local or State courts enforce or act upon, in reference to the rights of the citizens of the State in similar cases, so far as they are not repugnant to the laws of the United States.⁵ And the right of executors and administrators to sue in such courts, so far as citizenship is concerned, depends upon the citizenship of such executors or administrators, and not upon that which was the decedent's whom they represent.⁶ But in exercising such juris-

¹ *Gilman v. Gilman*, 53 Maine, 184.

² *Ibid.*

³ Louisiana Code, Articles 2369,
2370; *Conner v. Elliott*, 18 How. 591.

⁴ *Ibid.*

⁵ *Walker v. Walker*, 9 Wall. 743, 754,
755.

⁶ *Childress v. Emory*, 8 Wheat. 642.

diction the United States courts will not regard as applying to them, State laws taking away in effect their jurisdiction as between citizens of different States.¹

State Statutes in Derogation of Jurisdiction of United States Court. A State statute preventing suit against executors and administrators of insolvent estates, is not construed to extend to creditors, residents of other States, so as to exclude them from suit against such executors or administrators in the United States circuit court. No law of any State can restrict the constitutional and legal right of a plaintiff to sue in said court. A State may pass general laws of limitation, as to the time within which actions may be brought, but they must be of a reasonable character, acting uniformly, and as such may become the law of the *forum* of a United States court administering the laws of such State; but to deny the action altogether is in contravention of the right of the citizens of one State to sue citizens of another State in the United States courts; a right given by the Federal constitution and laws, and which cannot be circumscribed by the laws of a State.²

Thus a law of a State preventing suit against the executor or administrator after the estate is declared insolvent, and directing distribution of assets among certain then recognized creditors and established claims, if to be regarded simply as a denial of right of action, has no application to United States courts whose power to entertain such suits, as well as the rights of a plaintiff otherwise qualified to sue, in these courts emanate from the national government, and are not affected by any such law which strikes not only at the right of the citizen to sue, but at the jurisdiction of the court itself. If, on the other hand, the restriction is regarded merely as part of the State system of insolvency, then it is inoperative as against a creditor residing in a different State, for want of jurisdiction over his person or the debt, unless he has in some manner submitted personally to the jurisdiction in the State proceedings in which such insolvency is declared.³

¹ *Suydam v. Broadnax*, 14 Pet. 67, 75; *Watson v. Tarpley*, 18 How. 517, 521.

² *Suydam v. Broadnax*, 14 Pet. 67; *Union Bank of Tennessee v. Jolly*,

18 How. 503; *Watson v. Tarpley*, 18 How. 517, 521.

³ *Suydam v. Broadnax*, 14 Pet. 67, 74, 75, 76; *Union Bank of Tennessee v. Jolly*, 18 How. 503; *Watson v. Tarpley*, 18 How. 517.

Judgment Lien. The effect of the judgment lien, or other operation of the judgment when obtained, upon the assets of the deceased debtor, depend upon and are controlled by the local or State law, otherwise irremediable conflicts of jurisdiction would be liable to arise.¹ The case cited of *Watson v. Tarpley*, affords an apt illustration of this principle. It was an action on a bill of exchange, for non-acceptance thereof on presentation before due, for acceptance; recovery was resisted by defendant as to that particular bill, by virtue of a statute of the State of Mississippi (the suit being pending in the United States Circuit Court for the Mississippi district), which declared in substance that no action should be maintained on any bill, until after maturity. The court below ruled thereon for defendant, but on error to the United States Supreme Court, that court held, it being a general rule of commercial law that a right of action accrues to the payee or endorsee of a bill on presentation and refusal to accept, and that this law is not circumscribed to any local limits, and cannot be by State laws, in its applicability to the United States courts, inasmuch as it would infringe upon the jurisdiction of these courts, and impair the rights of citizens and others secured by the constitution and laws of the United States, to litigate therein.² In the same case, the Supreme Court referring to their ruling in *Swift v. Tyson*,³ with approval, as to the extent to which State laws are by act of Congress designed to be made the law of the Federal courts, recur to the act of Congress known as the Judiciary act, which provides that the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply, and say: "It never has been supposed by us, that this section did apply, or was intended to apply to questions of a more general nature, not at all dependent upon local statutes, or local usages of a fixed and permanent operation; as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law."⁴

¹ *Union Bank of Tennessee v. Jolly*, 18 How. 503, 507; *Williams v. Benedict*, 8 How. 107; *McGill v. Armour*, 11 How. 142.

² *Watson v. Tarpley*, 18 How. 517, 521.

³ 16 Pet. 1.

⁴ 18 How. 520.

XI. PLEADINGS IN INTER-STATE SUITS IN ADMINISTRATION MATTERS.

Suit on Judgment of other State. *Ne unques administrator* is not a good plea to an action by an administrator on a judgment rendered in his favor as administrator. The question of the plaintiff's capacity or right to sue is settled, and merged in the former proceeding and judgment. The right becomes, by such judgment, a personal one in the administrator, which he may recover on without stating his capacity; and, therefore, when his character as administrator is stated in the declaration or petition in such action, it is to be regarded merely as *descriptive*.¹ In the case here cited of *Biddle v. Wilkins*, the action was one of debt upon a judgment rendered in the district court of the United States for the western district of Pennsylvania, in favor of plaintiff as administrator, which Pennsylvania judgment was rendered on a judgment obtained in the mayor's court at *Calcutta* by plaintiff as such administrator. To the action in Mississippi, the defendant pleaded, *First, ne unques administrator; Secondly*, that defendant was himself the administrator of the same decedent, duly appointed as such in the State of Mississippi; and, *Thirdly*, that the judgment sued on was obtained by fraud. To the two first pleas, there was a demurrer, and there was joinder in fact to the third, to the country. Judgment was rendered for defendant on the demurrer and the case went up on error to the supreme court of the United States. On argument of the demurrer there, the first plea was substantially abandoned as bad, and reliance was placed upon the second. The court regarded it as substantially raising the same point as the first, but in a more exceptionable form. In disposing of the case in the supreme court, THOMPSON, J., delivering the opinion, says: "The debt sued for is, in truth, due to the plaintiff in his personal capacity, and he may well declare that the debt is due to himself," and that, therefore, it was "totally immaterial whether the defendant was or was not administrator, * * * in the State of Mississippi." The judgment below was reversed, with an order for leave to plead anew, if desired.²

¹ *Biddle v. Wilkins*, 1 Pet. 686; *Tal-*
mage v. Chapel, 16 Mass. 71.

² 1 Pet. 693.

CHAPTER XXV.

PRIVATE CORPORATIONS AND WORKS EXISTING IN TWO OR MORE STATES.

- I. POWER TO SELL CAPITAL STOCK THEREOF ON EXECUTION.
- II. POWER TO TAX MORTGAGE DEBT THEREOF BY THE STATES.
- III. LIABILITY TO SUIT FOR COMMON LAW CAUSE OF ACTION.
- IV. POWER OF UNITED STATES COURT AS TO MORTGAGE, FORECLOSURE AND SALE OF PROPERTY SITUATED IN TWO STATES.

I. POWER TO SELL CAPITAL STOCK OF INTER-STATE WORKS ON EXECUTION.

Nice questions of law sometimes arise in regard to jurisdiction of State courts concerning inter-State corporate works of internal improvements.

Process from State Court. Thus, where the corporation and its work exist in two or more States, as, for instance, in the case of the Dismal Swamp Canal Company and its works, the corporation existing by law in both Virginia and North Carolina, and the works of the company being partly in each of these States, and the stock of the company being by statute declared real estate, it is held that it cannot be levied and sold on execution emanating from State courts of either of said States, if it is to be considered as savoring of the realty in reference to execution, levy and sale.¹

Savoring of the Realty. In such case the capital stock savors of the realty, which exists in part in each of the States, and the shares being on the whole amount thereof, and yet indivisible in themselves, it results that each share represents land in each of said States, and that a sale in one State cannot confer title to property locally situated in the other, nor to any part of the property situated in the State wherein the proceedings are had,

¹ Cooper v. The Dismal Swamp Canal Co., 2 Murph. L. & Eq. (N. C.) 195; Rorer on Jud. & Ex. Sales, 2d Ed. § 1325.

inasmuch as the share interests are of an entirety and cannot be so separated as to affect only the property lying within the State where the sale is made. Hence, where an execution sale of capital stock of the Dismal Swamp Canal Company was made in North Carolina on process from a court of North Carolina, and the purchaser took proceedings in chancery against the company to enforce the transfer of the capital stock upon its books, the enforcement thereof was refused, on the ground that the sale was void for want of jurisdiction in the court under whose process the sale was made to reach the same by its process, if the stock was to be regarded as realty.¹ But the supreme court of North Carolina seem disposed to regard the statutes declaring the capital real estate, as intended to give it an inheritable character rather than to influence its liability to sale on execution, maintaining, however, as herein stated, that if it is to be considered as in that respect affecting its liability to levy and sale, then such disposition of it under State process would be a legal impracticability for the jurisdictional reasons already stated; and that, therefore, no execution sale of it could be made if it were real estate; that if it is to be regarded otherwise, then, as mere choses in action, the shares of stock could not be so sold, since in North Carolina choses in action or capital stock of a private corporation was not in law liable to levy and sale on execution. In order to more clearly illustrate the ruling of the court and character of the proceeding in that case, we annex here a marginal note of the material part of the opinion of the court.²

¹ Cooper v. The Dismal Swamp Canal Co., 2 Murph. L. & Eq. (N. C.) 195; Rorer on Jud. & Ex. Sales, 2d Ed. § 1325.

² Cooper v. Dismal Swamp Canal Co., 2 Murph. L. & Eq. 195. HALL, J.: "The last question submitted to this court should be first considered. Have the courts of North Carolina jurisdiction of the present suit? It is to be observed that the canal lies partly in Virginia and partly in this State, and that the acts of assembly incorporating the company give no preference to the courts of either State. And it is to be further observed that the office

of president and directors of the company has by these acts been located. It therefore follows that the courts of each State have equal jurisdiction; but the court in either State in which a suit shall be first properly instituted does, by such priority, oust all other courts of the jurisdiction during the pendency of such suit and while any judgment which may be regularly given in such suit remains in force.

"But the complainant has not applied to the proper jurisdiction. He ought to have applied to a court of common law for a *mandamus* to compel the officers of the company to

II. POWER TO TAX MORTGAGE THEREOF.

Not Taxable in Either State. Mortgage bonds of a railroad corporation, created as a corporation by the laws of two different and adjoining States, and whose line of road is an entirety, and is partly situated in each of those States, and is in all its parts covered by the mortgage and bonds, as such entirety, cannot be subjected to taxation in and by either of said States.¹

register his deed in case he be entitled to have it registered. * * * It is not necessary to discuss this point, as the first and second points made in this case must be decided against the complainant.

"It is true that the acts of incorporation declare that the shares shall be considered *real property*, and it is also true that real property may be sold under writs of *fieri facias* in this State. But it was not contemplated to make such shares liable to debt as real property. The object of the acts was to give the shares the quality of being inheritable. This idea is strengthened by a clause in the act which declares that there shall be no severance of a share. If the shares are to be considered real property as to the payment of debts, they must be viewed as savoring of and issuing from the land, in which case they have locality; and part of the land lying in Virginia is not within the jurisdiction of this court, so that an execution could be levied on it; and we have just seen that that part which lies in this State cannot be sold, because there can be no severance of a share. If the shares be considered as unconnected with the land, although as to some purposes they be considered as real estate, yet, as to executions, they are *choses in action*, and not the subject of seizure or sale. It may be aptly said of them what Lord ELLENBOROUGH, in the case of Scott

v. Scholey, (8 East, 467) said of equitable interests in terms for years, 'that they had no locality attached to them so as to render them more fitly the subject of execution and sale in one country than in another.'

The complainant, purchaser and holder of a sheriff's deed for stocks sold on execution, had brought his bill to compel the president and directors to register his deed.

¹*Railroad Company v. Jackson*, 7 Wall. 262. The tax referred to in this case was levied by the State of Pennsylvania of three mills on the dollar of all money owed by solvent debtors. The debt of railroad corporations it claimed to reach by requiring the debtor corporation to pay the tax and allowed it to deduct the same from payments of coupons. To this the creditor declined to submit, and brought suit upon his coupons. The United States supreme court held the tax illegal. See *Railroad Co. v. Pennsylvania*, 15 Wall. 300. Neither are bonds issued by a railroad company in the hands of a non-resident of a State subject to taxation in the State of the company. See cases just cited, and also *Davenport v. Miss. & Mo. R. R. Co.*, 12 Iowa, 539; *People v. Eastman*, 25 Cal. 603; *Commonwealth v. Chesapeake & Ohio R. R. Co.*, 27 Gratt. 344. See, on the contrary, *Maltby v. Reading & Col. R. R. Co.*, 52 Penn. St. 140.

Such mortgage indebtedness rests for its security upon the credit and value of the entire line of road, its fixtures and franchises in both States, and which is indivisible, and so is each bond of the mortgage debt. The security being an entirety, and existing as it does locally in two different States, and is equally liable to sale in satisfaction of the mortgage debt. If one of these States may tax the whole, so may the other, and each will, in that case, tax interests and property situated in part without its territorial limits and jurisdiction, while neither that portion of the road situated in one or the other of these States is separately liable for any separate part of such indebtedness or bonds, but each is liable with all its interests for the whole. No portion of the bonds pertain to any one part of the road more than to another; and as there is no severance to the bonds, none can be made for taxation proportionate, or in reference to, the comparative work or line of road within the two different States. If taxable as to one bond, it is so as to all, and if in one State, so likewise in the other; and the result would be double taxation of the bonds or bondholders, and thus the burden would increase and be doubled again, if permissible at all, and the line of the road and its unity existed in still another one or more States. In the language of the United States supreme court, NELSON, J., as a better illustration than our language may give, "If Pennsylvania can tax these bonds, upon the same principle Maryland can tax them. * * * The only difference in the two cases is, that the line of road is longer within the limits of the former than the latter. Her tax would be a more marked one beyond the jurisdiction of the State, as the property and interests outside of its limits would be larger. The consequence of this taxation of three mills on the dollar, if permitted, would be double taxation of the bondholders. Each State could tax the entire issue of bonds. * * * The effect of this taxation upon the bondholders is readily seen. A tax of three mills per dollar of the principal at an interest of six per centum payable semi-annually, is ten per centum per annum of the interest. A tax, therefore, by each State at this rate amounts to an annual deduction from the coupons of twenty per centum; and, if this consolidation of the line of road extended into New York or Ohio, or into both, the deduction would have been thirty or forty. If Pennsylvania must tax bonds of this description, she must confine it to bonds issued

exclusively by her own corporations. * * * To permit the deduction of the tax from the coupons in question, would be giving effect to the acts of the legislature of Pennsylvania upon the property and interests lying beyond her jurisdiction."

III. LIABILITY TO SUIT FOR COMMON LAW CAUSE OF ACTION.

Suit in Either State. A railroad company which is incorporated by two States, and which operates as one road in both States, is liable to an action in the courts of one of those States for dereliction of common law duties in the other State, as a common carrier, by discriminating between persons as to transportation on the road.¹ The case cited of *McDuffee v. The Portland & Rochester R. R. Co.*² was this: The Portland & Rochester Railroad Company, chartered by both the States of New Hampshire and Maine, and operating its road in both said States, discriminated in the State of Maine between certain persons in relation to the carriage, accommodations and price of carriage of express matter. There being a statute in New Hampshire inhibiting such discrimination, the plaintiff predicated his right of action upon such statute. Objection being made thereto, the court ruled that the statute but re-enacted the common law on the same subject, and which prevailed in Maine, and that, therefore, the common law right of action being essentially the same in both States, and the action being a transitory one, it might be maintained in the courts of New Hampshire, if the pleadings be so reformed as to make it an action at common law, saying nothing of the statute, and advised an amendment accordingly; and in so amending the court suggested, that it might be well to employ as much of the statutory language as practicable, but without reference to the statute.

This proceeding was an action on the case, and the decision of the New Hampshire court asserts the right to maintain such an action, if for a common law cause, in one State for a cause arising in another State, when the laws of each on the subject of the right are as at common law, against a railroad corporation operating its road in both States. So, in the case of *Harris v. The Baltimore & Ohio Railroad*, a corporation created in Maryland,

¹ *McDuffee v. The Portland & Rochester R. R. Co.*, 52 N. H. 430; *Railroad Co. v. Harris*, 12 Wall. 65.

² 52 N. H. 430.

and subsequently in the State of Virginia, and by act of Congress in the District of Columbia, by which its corporate capacity was extended under one and the same name into both Virginia and said District, making it one and the same corporation, with like powers in each. The plaintiff below, Harris, having bought a ticket in the District of Columbia over the road of said company to the Ohio river, was injured *en route* in Virginia, by a collision. Having sued the corporation in the District of Columbia for his injuries in Virginia, and the case having gone to the supreme court of the United States, that court held that such action would lie in said District, the company being one and the same there and elsewhere.¹ In this case the plaintiff alleged a contract for safe transportation, and that by negligent management a collision occurred causing the injury, resting the right of action partly on contract and partly in *tort* as for *negligence*. The contract for passage was made in the District of Columbia, and the court held the suit rightly brought there. The action was predicated on only a common law right; thus the question as to the right to sue in one State, in a statutory action, for injuries incurred in another State, for which an action is given by statute of the State where the injury occurs, did not arise in this case.

So in the case of *Richardson v. The Vermont & Massachusetts Railroad Company*,² incorporated by, and operating its road in, the States of Vermont and Massachusetts, the supreme court of Vermont, in an action *ex contractu*, held that the company were liable to suit in each of said States. Moreover, the Vermont charter embodied a clause in substance requiring some officer of the company to at all times reside in Vermont, on whom process could be served, and that the company should be held to answer in the jurisdiction where service and return should be made.³ But here again, the point is not reached as to whether, if an action be brought in one of those States against this same company for an injury inflicted within the territorial limits of the other of those States, and the character of the action is not one at common law, but is one created by a statute of the State wherein the injury occurs, jurisdiction can be sustained in the State where such suit is brought.

¹ *Railroad Co. v. Harris*, 12 Wall. 65.

² 44 Vt. 613.

³ *Richardson v. Vermont & Mass. R. R. Co.*, 44 Vt. 613.

IV. POWERS OF UNITED STATES COURT AS TO MORTGAGE FORECLOSURE AND SALE OF PROPERTY SITUATED IN TWO STATES.

But when the proceeding is in the circuit court of the United States, and the proper parties exist to confer jurisdiction, as well as all other necessary jurisdictional circumstances to enable such court to take cognizance of the subject matter of the suit, and actual jurisdiction be obtained of the parties, then the court may decree in reference to the subject matter; as, for instance, against corporate works situated partly in two different States, and if the proceedings be for foreclosure of a mortgage against the same, and for sale thereof, irrespective of the property being locally situated in different States and districts than that in which the court is held, then the decree, in addition to order of sale, will enforce the parties in possession to deliver over to the purchaser the property sold on confirmation of the sale.¹

¹ Muller v. Dows, 4 Otto, 444, 448, burgh & Steubenville R. R. Co., 55
449. See, also, McElrath v. Pitts- Penn. St. 189.

CHAPTER XXVI.

FOREIGN PRIVATE CORPORATIONS.

- I. INTER-STATE SUITS BY AND AGAINST CORPORATIONS.
 - II. RIGHT OF A STATE TO EXCLUDE CORPORATIONS OF OTHER STATES.
 - III. FOREIGN CORPORATIONS MAY DO BUSINESS IN A STATE IF NOT PROHIBITED. WHAT LAW GOVERNS THEIR CONTRACT.
 - IV. INTER-STATE POWER OF CORPORATIONS TO HOLD LANDS.
 - V. INTER-STATE SUIT AGAINST STOCKHOLDERS TO ENFORCE INDIVIDUAL LIABILITY.
 - VI. INTER-STATE CONSOLIDATION OF RAILROAD CORPORATIONS.
 - VII. POLICE POWER OVER FOREIGN CORPORATIONS IN A STATE.
- I. INTER-STATE SUITS BY AND AGAINST FOREIGN CORPORATIONS.

May be Plaintiffs. Actions and suits *ex-contractu* may, by *comity*, be brought by a corporation, as plaintiff, in the courts of other States than that wherein the plaintiff resides, against natural persons or corporations of such other States; and this, too, irrespective of whether such plaintiff corporation be created under State or national authority.¹ But *quære*, as to actions for torts. It is suggested by high authority that the latter cannot be maintained.² In the case here cited, the supreme court of Illinois, LAWRENCE, J., say: "This was an action for a libel, brought by an insurance company incorporated under the laws of the State of Ohio. A demurrer to the declaration was sustained in the superior court, and that ruling is assigned for error. It has been held, both in England and this country, that a domestic corporation may maintain an action for libel. Whether a

¹ Angel & Ames on Corps. §§ 372, 376; Libbey v. Hodgdon, 9 N. H. 394; Tombigbee R. R. Co. v. Kneeland, 4 How. 16; Bank of Augusta v. Earle, 13 Pet. 519; Bank of Marietta v. Pindall, 2 Rand. (Va.) 465; British Am. Land Co. v. Ames, 6 Met. 391; Frazier v. Willcox, 4 Rob. (La.) 519;

Bank of Edwardsville v. Simpson, 1 Mo. 184; Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87; 1 Potter on Corporations, § 83. See, also, National Bank v. Nichols, 4 Biss. 315.

² Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87.

foreign corporation may do so is a question which we do not find to have been decided. It is only by *comity* that we permit a foreign corporation to bring suit in our courts, upon its contracts, and it is not necessary to decide in the present case whether the comity should be so as to permit a suit for libel, as we are of opinion that, even conceding the power to sue, the demurrer to the present declaration was properly sustained."¹

Defendants. In States where there are no such statutory provisions for service on an agent, or no such agency and office exists, corporations of other States cannot be personally sued. For it is a settled principle, that corporations dwell in the State of their creation, and cannot emigrate or be personally present in another, so as to be there sued by service on the corporate body.² If a non-resident or foreign corporation has property in a State, subject by law to its debts or liabilities, proceedings *in rem* may be sustained in the courts of the State wherein the property is, and the same may be seized by attachment, and condemned and sold.³ And it is not every cause of action arising against a corporation in the State of its creation that can, by *mere comity*, be enforced against it in a different State. The better doctrine seems to be, that in the absence of statutory provisions to the contrary, only actions *ex contractu* may be so enforced in another State.⁴ If, however, the statute of such other State, as is the case in

¹ Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87.

² Andrews v. Michigan Cent. R. R. Co., 99 Mass. 534; Newell v. Great Western Ry. Co., 19 Mich. 336. In the case of Andrews v. Michigan Cent. R. R. Co., HOAR, J., says: "This is an action against a railroad corporation established in the State of Michigan, and the only service of the writ was upon the treasurer of the corporation, at their office in Boston. There was no attachment of property. The writ alleges that the corporation has its usual place of business within the commonwealth. We are aware of no authority for the maintenance of such an action, and none has been found by the diligence of the learned counsel for plaintiff. On the con-

trary, the numerous cases cited for the defendant fully support the opposite conclusion. A foreign corporation can only be sued in this commonwealth by means of an attachment of its property, unless, as in the case of foreign insurance companies, by virtue of an express statute provision." See, further, Lathrop v. Union Pac. R. R. Co., 1 McArthur, 234.

³ Andrews v. Michigan Cent. R. R. Co., 99 Mass. 534. See *ante*, Chap. XII., and Drake on Attachment, §§ 79, 80. See, also Selma, etc., R. R. Co. v. Tyson, 48 Geo. 351.

⁴ Harriott v. New Jersey R. R. Co., 2 Hilton, 262. On this subject see Chapter XV., § 3.

Massachusetts, in regard to foreign insurance companies, provide for jurisdiction of its courts over causes of action generally arising therein against such foreign corporations, and provides for service on the agent of the corporation transacting business as such in the State, then actions other than those upon contracts will lie against the company therein, if the right of action accrues within the State.¹

Defendants, Continued. Service on Resident Agent. Jurisdiction of a foreign corporation thus obtained by service on a resident agent or officer thereof, (the law providing for such service on agents of foreign corporations doing business within the State,) is *personal* of the corporate body; it places the corporate *entity* or *person* in court, as defendant, and will not only sustain or justify a general judgment against it, if a case be made out, for a recovery,² but an action may be sustained upon such general judgment against the corporation in the proper court of the State wherein such corporation is created and exists by law, if the same be properly authenticated.³

Appearance gives Jurisdiction. Although, except by service on its agent, when authorized as aforesaid, a foreign corporation may not be subject to suit by personal service, as the corporate entity is in another State, and it may be that no service is attainable as against it as a legal person; yet if the court has jurisdiction of the subject matter of the action or cause of action, consent may confer jurisdiction of the legal person or corporate body,

¹ *Andrews v. Michigan Cent. R. R. Co.*, 99 Mass. 534.

² *Gibbs v. The Queen Ins. Co.*, 63 N. Y. 114, 124; *Martine v. International Life Ins. Society*, 53 N. Y. 339, 348; *Libbey v. Hogdon*, 9 N. H. 394. It has been held, in Georgia, that a foreign corporation doing business within that State is subject to the jurisdiction of its courts, and may be served by serving the officer or agent of the corporation. *City, etc., Ins. Co. v. Carrugi*, 41 Geo. 660. It is within the power of a State legislature to authorize a suit against a foreign corporation *in personam*. *Barrett v. Chicago, etc., R. R. Co.*, 4 Hun, 114; *S. C.*, 6 Thomp. & C., 358. Foreign

corporations, whether of other of the American States, or of countries strictly foreign, doing business and exercising the special privileges within a State, with agents therein, by permission of and in compliance with the local law thereof, are regarded as domiciled there, and liable, as domestic corporations are, to the law of the land. *Martine v. International Life Ins. Society*, 53 N. Y. 339, 346, 348; *Milnor v. N. Y. & N. H. R. R. Co.*, 53 N. Y. 363, 367; *Newby v. Von Oppen*, L. R. 7 Q. B. 293.

³ *Lafayette Ins. Co. v. French*, 18 How. 404; *Gibbs v. The Queen Ins. Co.*, 63 N. Y. 114.

and the appearance of a foreign corporation to the action, by an attorney, and answering thereto, amounts to such consent, and places the defendant in court subject to its jurisdiction.¹ So, the appearance and pleading by a non-resident insurance company, defendant to an action in a court of Minnesota, instituted against it under the statute, by mere filing of a petition, is a waiver of all irregularities or insufficiency as to the manner of bringing the action, and places the defendant in court.² And the provision of said statute rendering insurance companies organized by foreign governments liable for twenty-five *per centum* damages on the amount found against them for neglect to pay insurance money, in case of loss, within the time specified in the policy, applies only to such companies as are incorporated by governments *strictly foreign*, and not to those companies incorporated by others of the American States.³

Construction — compliance with Local provisions. A contract of insurance with a foreign insurance company, the policy in which, though executed by the company in another State, and delivered by its agent to the assured in the State where he resided, and there paid for by the assured, and before delivery countersigned by the agent, and which contained a provision that it should not be obligatory until paid for and so countersigned, is held to be a contract made in the State where the same was delivered by the agent, and governed by the laws of that State, in reference to its construction and interpretation.⁴ Foreign insurance companies who in Massachusetts have issued policies before complying with the statute of that State, authorizing them to do business therein, may, after compliance, enforce by suit the payment of assessments on such policies.⁵ Where by law something is required of foreign corporations as a condition to doing business in the State, the ruling is, that a foreign corporation which has not complied with the

¹ McCormick v. Penn. Cent. R. R. Co., 49 N. Y. 303, 309; McQueen v. Middletown Manf. Co., 16 John. 5; Faulkner v. Del. & Rar. Canal Co., 1 Denio, 441; Paulding v. Hudson Manf. Co., 2 E. D. Smith, 38; Watson v. Cabot Bank, 5 Sandf. 423; S. C., 4 Duer, 606, note; De Berner v. Drew, 39 How. Pr. 406.

² Pryce v. Security Ins. Co. of N. Y. 29 Wis. 270.

³ Ibid.

⁴ Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398; Heebner v. Eagle Insurance Co., 10 Gray, 131, 143; Kennebec Co. v. Augusta Ins. and Banking Co., 6 Gray, 204, 208.

⁵ National Mut. Fire Ins. Co. v. Pursell, 10 Allen, 231.

requirements of the local statute as to the terms upon which it may do business in said States, cannot recover on a note given to it for premium on insurance by it therein.¹

Defendant, where State is a Stockholder. Though a sovereign State may not be sued without its own consent, yet such exemption from suit does not extend to a corporation for business purposes in which the State is a stockholder; nor if the State owns all the stock, while the president, directors and other designated persons are the corporate body. In the latter case, this corporate entity or "metaphysical person is liable to suit," notwithstanding the interest it represents belongs to the State.² In the case here cited of *Bank of Kentucky v. Wister*, the United States Supreme Court, JOHNSON, J., say: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. * * * Thus many States of the Union which have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued."³ A railroad corporation of one State which has built a railroad in such State, is liable for a violation of a patent on said road by a corporation of a different State, which is sole operator of the road, and sole owner of the capital stock thereof.⁴ The corporation cannot absolve itself from responsibility and performance of its obligation without consent of the legislature. It may doubtless lease or confide the operating of the road to others, but such others' wrong acts are its own wrong acts in that respect, unless the letting or sale be authorized by the legislature or charter.⁵

A Quo Warranto lies only in the Home State. Courts of a State other than wherein a corporation is created, are powerless to inquire into and declare a forfeiture of its corporate charter or privileges. They have no jurisdiction to determine that question, either in a collateral or direct inquiry. Such inquiry and judgment of forfeiture can only be had in the courts of the State which conferred or granted the corporate powers.⁶ Such

¹ *Etna Ins. Co. v. Harvey*, 11 Wis. 394; *Williams v. Cheney*, 8 Gray, 206; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547.

² *Bank of Kentucky v. Wister*, 2 Pet. 318; *Bank of United States v. Plant-*

ers' Bank of Georgia, 9 Wheat. 904.

³ 2 Pet. 318, 323.

⁴ *York & Maryland Line R. R. Co. v. Winans*, 17 How. 30.

⁵ *Ibid.*

⁶ *Carey v. Cin. & Chi. R. R. Co.*, 5

proceeding should be against the persons claiming to be the corporators and not against the acting corporation by its assumed corporate name.¹ To proceed against it by its corporate name, would in effect be an admission of its corporate existence.²

II. RIGHT OF A STATE TO EXCLUDE CORPORATIONS OF OTHER STATES.

May do Business by Comity. Whatever the right of a State may be to exclude corporations of a foreign *nation* from doing business within its limits, a matter which it is not our purpose to consider, as it does not come within the compass of our subject, yet, if the question as to the power of the American States to exclude corporations of their sister States from that privilege had never been touched upon by decisions of our U. S. Supreme Court, then it would seem to us that under that part of sec. 2 of article IV., of the United States constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," no State can exclude the citizens or corporations of citizens, of any others of the States from carrying on or transacting any such business within its limits, as its own citizens or corporations of its own citizens are allowed to carry on and transact therein. This subject, however, has repeatedly been before the United States Supreme Court, and the uniform ruling has been that the provision of the national constitution above referred to, relates to *natural* persons, and not to artificial bodies as corporations, and that the *privileges* and *immunities* guaranteed thereby means those of a general character, allowed to a State's own citizens, and not those special privileges conferred on corporate bodies.

In *Lafayette Ins. Co. v. French*,³ the Supreme Court of the

Iowa, 357, 368; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *Trustees of Vernon Society v. Hill*, 6 Cow. 23; *People v. The Society for Propagating the Gospel*, 1 Paine, 653.

¹ *State v. Independent School Dist.*, 44 Iowa, 227; *Mud Creek Draining Co. v. The State*, 43 Ind. 236; *People v. Rensselaer & S. R. R. Co.*, 15 Wend. 114, 128.

² *Mud Creek Draining Co. v. The*

State, 43 Ind. 236; *State v. The Independent School Dist.*, 44 Iowa, 227; *High on Extraordinary Remedies*, § 661.

³ 13 Pet. 519. So the same doctrine is substantially asserted by the same learned court, NELSON, J., in *Ducat v. Chicago*, 10 Wall. 410; also, by Justice FIELD in *Paul v. Virginia*, 8 Wall. 168, and still earlier in *The Bank of Augusta v. Earle*, 13 Pet. 519;

United States, CURTIS, J., say: "A corporation created by Indiana can transact business in Ohio, only by the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this court; *provided*, they are not repugnant to the constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State, from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." But if there be no express provision of law to the contrary, such permission may be presumed or implied.¹

The same doctrine is held in Virginia, that the States have a right to regulate the terms upon which foreign insurance companies may do business as corporations within their territorial limits, by all such reasonable regulations as do not infringe upon the jurisdiction of the national courts or rights of Congress under the constitution.² And that the privileges and immunities secured to the citizens in the several States under the constitution of the United States do not apply to legal persons or entities, such as private corporations of the several States.³ In the subsequent case of *Insurance Co. v. Morse*,⁴ the supreme

and in *Covington Drawbridge Co. v. Shepherd*, 20 How. 227; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286. In all those cases, the doctrine is recognized, that the admission of a foreign corporation to transact business within a State is discretionary with the State itself, and depends upon permission express or implied. In the language of the learned Justice FIELD, "the privileges and immunities secured to citizens of each State, in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intend-

ed by this provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given." *Paul v. Virginia*, *supra*.

¹ Story's Conf. of Laws, § 38.

² *Slaughter v. Commonwealth*, 13 Gratt. 767.

³ *Slaughter v. Commonwealth*, 13 Gratt. 767, 773, citing *Commonwealth v. Milton*, and *Lexington v. Same*, 12 B. Mon. 212; *Tatem v. Wright*, 3 Zab. 429; *Corfield v. Coryell*, 4 Wash. C. C. 371.

⁴ 20 Wall. 445.

court of the United States, HUNT, J., say: "We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the State. These questions have been before the court in other cases, but they do not arise here." And, again, in *Doyle v. The Continental Insurance Co.*,¹ the court reassert the doctrine that a State may impose terms upon private corporations of other States doing business within its limits not inconsistent with the rights and jurisdiction of the Federal government and courts; and having given permission, may revoke it at will.² But, *quære*, as to this without cause, if contract rights have vested on the faith of such permission?

A State cannot Impose Terms which Conflict with the United States Constitution and Laws. But whatever other terms of doing business in another State may be imposed upon such corporation, it is well settled that the terms must not be such as impair the rights of the National government or courts under the constitution.

Hence a State law requiring foreign corporations, as a condition to doing business in the State, to enter into a stipulation to keep in such State an attorney or agent, on whom service in suits against the corporation may be made as on the corporation, and agreeing not to remove suits against such corporation from the State to the United States court, is invalid as violating the constitution; and such stipulation, so far as regards the removal of suits, is ineffectual to prevent removals, and that the jurisdiction of the United States court cannot be affected by either such statute or stipulation.³ But where such statute also requires in addition to such stipulation, and as a prerequisite to so transacting business in the State, a license authorizing it so to do, and requires such license to be cancelled by State authority in

¹ 4 Otto, 535. See, also, *Ducat v. Chicago*, 10 Wall. 410; *Lafayette Ins. Co. v. French*, 18 How. 404; *Christ Church v. Philadelphia*, 24 How. 300; *People v. Roper*, 35 N. Y. 629; *People v. Commissioners of Taxes*, 47 N. Y. 501.

² *Doyle v. Continental Ins. Co.*, 4 Otto, 535.

³ *Insurance Co. v. Morse*, 20 Wall. 445; *Doyle v. The Continental Ins. Co.*, 4 Otto, 535; *Insurance Co. v. Dunn*, 19 Wall. 214; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Holden v. Putnam Ins. Co.*, 46 N. Y. 1; *Hadley v. Dunlap*, 10 Ohio St. 1. See, also, *Home Ins. Co. v. Davis*, 29 Mich. 238.

the event of the parties removing a suit in violation of such agreement, as is the case in the statute of Wisconsin on that subject, it is held by the State court, since the decision in the *Insurance Co. v. Morse*, above referred to, that notwithstanding said decision of the United States supreme court as to the insufficiency of such legislation to prevent a removal of a suit, that nevertheless the State court may rescind such license if such removal be made.¹ How far this act of rescinding a license already existing for the mere doing of what the United States supreme court has held to be lawful will be upheld, has not, so far as we know, been decided by that court. But whatever the right of exclusion from doing business locally and entirely confined within a State, it is certain that no State can exclude a corporation which is engaged in *inter-State* transportation or commerce,² nor an inter-State corporation organized under or in accordance with a law of the United States.³

In the case here cited of *Pensacola Telegraph Company v. The Western Union Telegraph Company*, the supreme court of the United States, adverting to the ruling in *Paul v. Virginia*,⁴ to the effect that a State might exclude a corporation of another State from its jurisdiction, say that the case of *Paul v. Virginia* was not in reference to a corporation engaged in inter-State commerce, and that if it had been then very different questions would have been presented, as is shown by the terms of the opinion in that case.⁵

III. FOREIGN CORPORATIONS MAY DO BUSINESS IN A STATE, IF NOT PROHIBITED. WHAT LAW GOVERNS THEIR CONTRACTS.

No principle of the law is better settled than that corporations aggregate of a private nature, created in one State, may do such business in other States as their charter authorizes where created, if such business is not inconsistent with the laws or policy of such other States, and their contracts in reference thereto, if otherwise lawful, will be enforced.⁶

¹ *State v. Doyle*, 40 Wis. 175, 220.

² *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 6 Otto, 1.

³ *Ibid.*

⁴ 8 Wall. 168.

⁵ *Pensacola Telegraph Co. v. West-*

ern Union Telegraph Co., 6 Otto, 12, 13.

⁶ *Conn. Mutual Life Ins. Co. v. Cross*, 18 Wis. 109; *Thompson v. Waters*, 25 Mich. 214. See, *supra*, § 2 of this chapter. See, further, *Baltimore, etc., R. R. Co. v. Glenn*, 28 Md. 287;

The same principle is equally well settled that they have capacity to sue in the courts of such other States, in action *ex contractu*.¹ But a corporation of one State making contracts in another State does so by comity of the latter. Its power to contract, however, and the contract itself, is in reference to the law of its charter and the laws of the State wherein it is created and exists. These govern the nature, obligation and interpretation of the contract, and not the *local law* of the State where the contract is made, as ordinarily would be the case in reference to contracts between natural persons. But except so far as different by reason of the artificial character of the corporate person, its powers, capacities and purposes, the *local law* of the contract will apply.² Yet a foreign corporation doing business as a railroad company in another State, by extending the line of its road therein, by permission of law of such State, is deemed, as to contracts made therein by it, to possess the powers and as subject to the liabilities of similar corporations created by the State into which it is so allowed to enter, as settled by the adjudications of the courts of such State; and it will not be permitted, after making contracts therein, in the exercise of privileges thus conceded to it, to then set up incapacity to thus contract under the law of the State where it was chartered.³

A foreign corporation authorized by statute of another State to construct an extension of its road therein, and granting it all the privileges and immunities, and subjecting it to all the restrictions conferred and imposed on it by law in the State wherein it is created, though not made a domestic corporation by such grant, is, nevertheless, so far domesticated as to be exempt from process of attachment, when by the law of its creation it is so exempt.⁴ Such grant and the terms thereof of the State wherein it is thus allowed to enter and do business, are so far of the nature of a

Williams v. Creswell, 51 Miss. 817; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343; 1 Potter on Corporations, §§ 271, 272.

¹ Conn. Mutual Life Ins. Co. v. Cross, 18 Wis. 109; Bank of Augusta v. Earle, 13 Pet. 519. See, *supra*, § 1 of this chapter.

² Hutchins v. New England Coal

Mining Co., 4 Allen, 580; Bank of Augusta v. Earle, 13 Pet. 519; Arms v. Conant, 36 Vt. 744; Wood Hydraulic Co. v. King, 45 Geo. 34.

³ Milnor v. New York & N. H. R. R. Co., 53 N. Y. 363.

⁴ Martin v. Mobile & Ohio R. R. Co., 7 Bush, 116.

contract that the same may not be impaired by subsequent enactments or conduct of the State.¹

IV. INTER-STATE POWER TO HOLD LANDS.

Although corporations created by the laws of a State, and authorized to acquire and hold lands for the purposes of the corporation, cannot take and hold lands in another State without permission therefor expressed or implied, and although a law of such other State may render lands thus acquired and held subject to escheat or forfeiture to the State, yet lands thus acquired and held by trustees for use of such foreign corporation are rightfully held and possessed by such trustees and corporation until title is divested by the necessary legal proceedings of the State set on foot for that purpose.²

Hold Lands, if no Inhibition. If no statutory inhibition, corporations created in one State may sue in another State;³ may take lands in security for debts, and enforce such security;⁴ may make promissory notes and other contracts not violatory of the laws of such other States;⁵ and may loan money on mortgage therein, if authorized by its charter to so loan, where incorporated, and not prohibited by the laws of the State wherein the loan is made.⁶ But foreign railroad corporations, authorized by law of a State to do business therein are thereby doubtless authorized to take and hold necessary lands.

V. INTER-STATE SUIT AGAINST STOCKHOLDERS TO ENFORCE INDIVIDUAL LIABILITY.

Neither an action at law, or a bill in equity, will lie against a stockholder of a corporation to enforce individual *statutory* liability for corporate debts, in a court of a State other than that wherein the corporation exists in law, or was by law created,

¹ *Martin v. Mobile & Ohio R. R. Co.*, 7 Bush, 116.

² *Runyan v. Coster*, 14 Pet. 122; *Thompson v. Waters*, 25 Mich. 214. See, also, *White v. Howard*, 38 Conn. 342; *Carroll v. East St. Louis*, 67 Ill. 568; *U. S. Trust Co. v. Lee*, 73 Ill. 142; *Claremont v. Royce*, 42 Vt. 730.

³ *New York Dry Dock Co. v. Hicks*, 5 McL. 111.

⁴ *Ibid.*

⁵ *New York Floating Derrick Co. v. N. Jersey Oil Co.*, 3 Duer. 648; *Thompson v. Waters*, 25 Mich. 214.

⁶ *Farmers' Loan & Trust Co. v. McKinney*, 6 McL. 1.

although the defendant reside in such other State, or be found and served with process therein.¹

Such liability, in New Hampshire, being in virtue of the statute, it cannot be enforced in the courts of Massachusetts, inasmuch as the statute of New Hampshire imposing the liability and defining the remedy has no extra-territorial force, and therefore will not sustain an action in another State.² Nor will the courts of another State enforce the right upon principles of comity, when the remedy prescribed is of a character suitable only to the local jurisdiction; as, for instance, where the remedy is by bill in equity, in pursuing which, by the settled principles of equity practice, the other creditors and the corporation itself should be made parties; for a foreign court will not assume control of the affairs of a corporation of another State.³

VI. INTER-STATE CONSOLIDATION OF RAILROAD CORPORATIONS.

Does not Make them one Corporation. The consolidation of railroads existing in different States, and organized under the laws thereof, respectively, as separate and distinct organizations, does not make them one corporation or company, nor affect them in like manner as does the consolidation of such corporations when each is situated within and is organized under the laws of the same State. And though a corporation be created by two States, each of like name and import, the one in one State and the other in the other, and the two having such a physical connection as to make them practically one line and road, yet they are not the same legal entity in each State, but each is a separate corporation and organization. The effect is merely to create between them a community of interest in case the two be consolidated.⁴

Unity of Control and of Contract. Though such is the abstract

¹ Erickson v. Nesmith, 4 Allen, 233; Derrickson v. Smith, 27 N. J. Law, 166; First Nat. Bank v. Price, 33 Md. 487; Scoville v. Canfield, 14 John. 338. The courts, however, seem to hold that where the liability of the stockholders is in the nature of a contract, and does not conflict with the policy and laws of the *forum*, that such liability will be enforced. See Healy v. Root, 11 Pick. 389. Erickson v. Nes-

mith, *supra*; Smith v. Mutual Life Ins. Co., 14 Allen, 336.

² Erickson v. Nesmith, 15 Gray, 221.

³ Erickson v. Nesmith, 4 Allen, 233; Hadley v. Russell, 40 N. H. 109.

⁴ Racine & Miss. R. R. Co. v. The Farmers' Loan & Trust Co., 49 Ill. 331; Farnum v. The Blackstone Canal Co., 1 Sum. 47; Muller v. Dows, 4 Otto, 444.

doctrine and technical force of the law, yet when such consolidation is effected by permission of law of the two States, then, if the united line be practically placed under one and the same control, and contracts are made by such controlling power, assuming a unity of action and liability, courts will, for the protection of others interested, and to enforce good faith, hold that such contracts are made by each of such corporations.¹

This same question of the effect of such consolidation arose in Indiana, in *Paine v. The Lake Erie & Louisville Railroad Company*,² but the parties being *severally* before the court, it was found that full justice could be done without a formal decision of the question. The supreme court of Indiana said, however, in that case: "A very grave question is presented in the argument as to the power of two States to create *one* corporation. It is claimed that to maintain the action, the consolidation must have resulted in the formation of one company, and that this is simply impossible. It is urged that it might, with as much propriety, be argued that a child may have two mothers, as that two States can create one corporation. Under our view of the case, the question becomes of no importance. It is admitted by the counsel for the appellants that the effect of the consolidation might be to create two corporations with the same name and stockholders a unity of stock and interests. This suit, in our judgment, can well be maintained under either view. If there is but one corporation, as a result of the consolidation, then the suit is undoubtedly well brought; if there are two corporations, then all the parties necessary for a complete settlement of the matter in dispute are before the court."³

Unity of Interest, but not of Entities. The case cited of *Farnum v. The Blackstone Canal Co.*, involved the consolidation of two corporations created by different States. The learned Judge STORY, held, that while such consolidation created a unity of interest of the two, yet it did not follow that either of them ceased, by reason thereof, to exist, but that their powers, rights and duties remained distinct and general, as before. That there was no cor-

¹ *Racine & Miss. R. R. Co. v. The Farmer's Loan & Trust Co.*, 49 Ill. 331; *Bissell v. The Mich. Southern & N. Indiana R. R. Co.*, 22 N. Y. 258.

² 31 Ind. 283.

³ 31 Ind. 283. And as to the saving of such rights, see, also, *Phila. & Wilmington R. R. Co. v. Maryland*, 10 How. 376.

porate identity, and that neither was merged in the other; neither was there any merger of the two. The union was of interests and of stocks, but not of personal or legal identity or existence.¹

Domesticated. In Rhode Island, however, it is held that when corporations of two different States are united by legislative enactment of such States, each of such corporations is thereby *domesticated* in each State, and therefore neither is subject to attachment process in either State, inasmuch as only *foreign* corporations are subject to proceedings by attachment.² Where two such corporations are created as one line by legislative enactments of different States, then, in proceedings to foreclose a mortgage upon the works thereof situated in the different States, jurisdiction of a United States circuit court may be exercised to enforce foreclosure and sale in an entire proceeding against the whole interest in each State, if the court obtains jurisdiction of the parties in interest, notwithstanding a part of the property be locally situated in a State other than that where the court is sitting that makes the decree of sale.³

VII. POLICE POWER OVER FOREIGN CORPORATIONS IN A STATE.

Subjects of Police Power. All persons, whether natural or artificial, doing business within a State, are subject to the police powers and regulations thereof, other than such as are within the jurisdiction of the national government, as to the regulation of commerce. Thus, a railroad corporation of one State operating a railroad in another State is subject to the police power of the latter State; and so is that portion of its road which is situated therein. It results from this principle that such road and corporation is subject to the State law requiring railroads to be fenced, or else to be held liable to pay for injuries to live stock injured on such roads. The requirement is of a police nature, being intended to promote the safety of the traveling public, as well as to guard against injury to animals which may, without such fence, go upon the roads.⁴ For, although such State law has no *extra-*

¹ Farnum v. The Blackstone Canal Co., 1 Sum. 46, 62. See, also, Bissell v. Southern Mich. & N. Indiana R. R. Co., 22 N. Y. 258.

² Sprague v. Hartford, Providence & Fishkill R. R. Co., 5 R. I. 233.

³ Muller v. Dows, 4 Otto, 444; McElrath v. Pittsburgh & Steubenville R. R. Co., 55 Penn. St. 189.

⁴ Purdy v. New York & N. H. R. R. Co., 61 N. Y. 353.

territorial force, and therefore cannot reach the foreign corporation in the other State wherein it is created and exists,¹ yet it applies in the same force to railroads in the State belonging to and operated by foreign corporations as it does to such roads as belong to domestic corporations, and the power thereof may not only be brought to bear upon the roads, but also upon the foreign owners operating the same, where they have agents or officers subject by law to process as against the company resident within the State.²

¹ *Thompson v. Whitman*, 18 Wall. 457, and *ante*, Ch. VIII., § 1.

² *Purdy v. New York & New Haven R. R. Co.*, 61 N. Y. 353.

CHAPTER XXVII.

RECEIVERS, OTHER TRUSTEES, AND TRUST FUNDS.

- I. RECEIVERS OF STATE COURTS HAVE NO POWER IN OTHER STATES.
 - II. STATE COURTS HAVE NO POWER OVER EFFECTS IN HANDS OF A RECEIVER OF A UNITED STATES COURT.
 - III. RECEIVERS OF COURTS CANNOT SUE EACH OTHER AS SUCH.
 - IV. TRUST FUNDS WILL BE FOLLOWED INTO OTHER STATES.
- I. RECEIVERS OF STATE COURTS HAVE NO POWER IN OTHER STATES.

No Extra Territorial Authority. The powers of a receiver are co-extensive only with the jurisdiction of the court making his appointment. They do not reach property, although movable, which is situated beyond the confines of the State. He is the representative of the court, and from it derives his authority, and inasmuch as the authority of the court does not extend into other sovereignties than that in which the court exists, neither can the receiver's authority pass those bounds. Money and property in his charge are in the custody of the law, and whosoever would show himself entitled to it must do so through the same court, for the receiver is the creature of the court. The court carries out through him such of its powers as are to be enforced *in pais*; he can do only such acts as the court directs, or the laws permit; hence, he cannot sue in a different State for *choses in action* or for property of the debtor. His actions and powers are restricted to the State of his appointment.¹ But although jurisdiction of the State court does not extend to property in another State so as to reach it by process of sequestration or execution, or through a receiver; yet if the defendant having possession thereof be found within the jurisdiction of the court, it is said he may be compelled to bring the property within the

¹ Booth v. Clark, 17 How. 322; Farmers' & Merchants' Ins. Co. v. Needles, 52 Mo. 17.

jurisdiction, if personal property, or if real property to execute such conveyance thereof as will pass title according to the *lex loci rei sitæ*.¹ But the receiver himself cannot, as such, pass the bounds of the State to control such property. In the language of WAYNE, J., in *Booth v. Clark*, "He has no *extra* territorial power of official action; nor can the court appointing him confer such authority, or enable him to go into a foreign jurisdiction to take possession of a debtor's property; nor any power which can give him, upon principles of *comity*, a privilege to sue in a foreign court or another jurisdiction as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."²

II. A STATE COURT HAS NO JURISDICTION OF EFFECTS IN THE HANDS OF A RECEIVER OF UNITED STATES COURT.

A State court has no jurisdiction in regard to property which is in the hands of a receiver appointed by a United States court. Hence, where a railroad and its appurtenances has been placed in the possession of such receiver by authority of a Federal court, the State courts have no jurisdiction of a foreclosure proceeding to foreclose a mortgage against the same. Such a proceeding would involve a direct interference with the authority of the United States court, and would amount to contempt thereof. To enable a party to resort to any separate tribunal other than the one thus appointing a receiver, leave therefor must be had of such court.³

III. RECEIVER OF DIFFERENT COURTS CANNOT SUE EACH OTHER AS SUCH.

Not Suable Without Leave of Court. A trustee, or receiver of property and assets of an insolvent person or corporation, who is appointed such by a State court, before any proceedings

¹ *Booth v. Clark*, 17 How. 322, 332.
² 17 How. 338. See, further, *Warren v. Union Nat. Bank*, 7 Phila. 156; *Hope Mutual Life Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278. See, however, cases holding a contrary doctrine, *Hoyt v. Thompson*, 5 N. Y. 320; *Hunt v. Columbian Ins. Co.*, 55 Maine, 290.

See, also, *Ex parte Norwood*, 3 Biss. 504.

³ *Mil. & St. Paul R. R. Co. v. Mil. & Minn. R. R. Co.*, 20 Wis. 165, 174; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 369; *Wiswall v. Sampson*, 14 How. 52.

adverse thereto set on foot in a United States court, and whose duties arise under the laws of the State in regard to his trust, cannot be sued in reference to the subject matter thereof in a circuit court of the United States, although the amount in controversy and citizenship of the parties are sufficient to enable the court to take jurisdiction in a proper case for the exercise thereof.¹

Trust Fund Not Subject to Levy. Nor can the trust fund be levied on or disturbed in the hands of the trustee by process of execution from any other court.²

Exceptionable Cases. There are cases which are exceptionable, where a creditor has a specific lien, as a mortgage deed for security of his debt created by the debtor himself, the enforcement of which cannot interfere with the trust fund in the hands of the trustee. Then suit to foreclose and enforce such lien lies in a different court than the one from which the trusteeship emanates, as in a circuit court of the United States, for instance, the citizenship and amount involved being sufficient;³ or, as we suppose, in the same court, if possessed of the proper jurisdictional powers to enable it to dispose of or adjudicate the matter. For the right to a specific lien carries with it the right to enforce it, which is not displaced by death or insolvency of the debtor. Some of the cases cited here arose in relation to administrations of deceased persons; but the general rule is none the less applicable on that account, for administrators and executors are trustees, and in the exercise of the powers and performance of their duties they act as such, under the control of the court from whence emanates their appointment.

In the leading case cited above, the Agricultural Bank of Mississippi was proceeded against under a law of that State and its charter declared forfeited, and Peale was appointed trustee and assignee of the bank as sole representative of the corporation. This proceeding and appointment was in the State court. The plaintiff in the original action brought suit against the trustee in the circuit court of the United States for the District of Louisiana, setting up certain claims against the defunct bank, and

¹ Peale v. Phipps, 14 How. 368;
Vaughan v. Northup, 15 Pet. 1.

² Williams v. Benedict, 8 How. 107;
Wiswall v. Sampson, 14 How. 52;

Robinson v. Atlantic & G. W. R. R. Co., 66 Penn. St. 160; Skinner v. Maxwell, 68 N. C. 400.

³ Erwin v. Lowry, 7 How. 172.

claiming to enforce their payment against the said trustee and the trust estate in his hands. A decree in favor of the plaintiff was accordingly had in the circuit court, but the case coming up in the United States supreme court, among other points the question of jurisdiction in the circuit court, the supreme court held that there was no jurisdiction in the court below, and reversed the decree and directed judgment to be entered in the circuit court for Peale, who was the plaintiff in error, but defendant in the court below. The court, in that case, *TANEY, C. J.*, say: "We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi." And that, "no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his trust."¹ It is seen here, then, that the very ground upon which jurisdiction was denied in this case was the principle so often asserted in the courts, that the jurisdiction of another court, having previously attached to the case and subject matter of the suit, no other court can interfere therewith except in a properly appellate character.

The case which we have here cited of *Williams v. Benedict* is also a strong illustration of the same principle. By the law of Mississippi it became the duty of the orphans' court, where estates were insolvent, to order the property to be sold by the executor or administrator; cause the claims of creditors to be audited; and after deducting expenses of administration, last sickness and funeral charges, distribute the proceeds of sale among the creditors, a like *per centum* of the claims of each. A judgment creditor who had obtained his judgment against the administrator before insolvency of the estate was declared, caused exe-

¹ Peale v. Phipps, 14 How. 368, 374, 375.

cution from the United States circuit court in the northern district of the State, wherein the judgment was rendered, to be levied upon the property of the estate upon which the judgment would have been a lien in case the estate had been solvent. A bill was filed by the administrator to restrain by injunction the proceedings on execution, and though dismissed in the circuit court, the supreme court of the United States on appeal reversed the decision, and sustained the bill upon the ground that jurisdiction of the orphans' court had attached to the assets, and that they were in custody of the law and could not be seized by process of another court.¹ So, in *Wiswall v. Sampson*, it was held that lands in the charge of a receiver of a chancery court of the State of Alabama were not liable to levy and sale on an execution in the hands of the marshal, issued out of the circuit court of the United States for the district, notwithstanding the judgment was a lien in law upon the lands, and the execution was levied before the control or possession of the receiver attached, and that the remedy of the judgment creditor was by application to the same court that appointed the receiver, and that thereupon his rights and priority, if he had the latter would be respected in the distribution of the funds in court.²

In *Vaughan v. Northup*³ it was held that suit would not lie against an administrator in another State than where administration was obtained, for the reason that the administrator is bound by the law and his bond to account for all the assets coming into his hands to the courts of the government from which he derives his grant of administration. This, too, although the assets had been received by the administrator in the State in which he was sued.⁴

IV. TRUST FUNDS WILL BE FOLLOWED INTO OTHER STATES.

Trust funds will be followed and applied wherever they may be found, and so of trust estates in lands, if converted into or exchanged for lands in another State, equity will hold the land in the other State thus acquired subject to the original trust, except as may be necessary to give protection to innocent holders

¹ *Williams v. Benedict*, 8 How. 107.

² 15 Pet. 1.

³ 14 How. 52.

⁴ *Ibid.*

as *bona fide* purchasers.¹ The question, however, as to existence and abuse of the original trust is to be decided upon the law of the State wherein it is alleged to have existed.²

¹ *Pensenneau v. Pensenneau*, 22 Mo. 27; *United States v. State Bank*, 6 Otto, 30. ² *Pensenneau v. Pensenneau*, 22 Mo. 27.

CHAPTER XXVIII.

ADMIRALTY AND COMMON LAW JURISDICTION IN MARITIME CASES.

- I. ADMIRALTY JURISDICTION.
- II. MARITIME LIENS.
- III. MARITIME TORTS.
- IV. COMMON LAW JURISDICTION OF MARITIME CASES.

I. ADMIRALTY JURISDICTION.

The United States district courts have jurisdiction in all cases, civil and criminal, of a maritime character. Or, in the language of the constitution, "all cases of admiralty and maritime jurisdiction." This jurisdiction depends in most cases upon the locality or place where the cases arise, and not upon the character of the cases involved.¹ It is sufficient to confer jurisdiction if they arise upon the public navigable waters;² and if such be the locality, then it is no objection to this admiralty jurisdiction, that the place is within the body of an organized State or county.³

The United States district courts have exclusive jurisdiction of all maritime cases purely in admiralty where the proceeding is *in rem*, or what is termed admiralty proceedings, as contradistinguished from proceedings *in personam* against the owner or persons in control of the thing that is derelict, instead of against the thing itself.⁴

The best guides as to the extent of such admiralty jurisdiction so vested in the Federal courts are, in the language of Justice

¹ The *Belfast*, 7 Wall. 624, 637; The *Plymouth*, 3 Wall. 20; Desty's Federal Procedure, § 563, p. 22; 1 Conkling's U. S. Admiralty, 1, *et seq.*

² The *Genesee Chief v. Fitzhugh*, 12 How. 443.

³ *Waring v. Clarke*, 5 How. 441.

⁴ The *Belfast*, 7 Wall. 624, 636; *Waring v. Clarke*, 5 How. 441; *Vose v. Cock-*

roft, 44 N. Y. (5 Hand.) 415; *Bird v. The Steamboat Josephine*, 39 N. Y. 19; *De Lovio v. Boit*, 2 Gall. 474; *Dunlap's Ad. Pr.* *43; The *Moses Taylor*, 4 Wall. 411; The *Hine v. Trevor*, 4 Wall. 555; see Desty's Federal Procedure, § 563, p. 22; 1 Conkling's U. S. Admiralty, 1, *et seq.*

CLIFFORD, "the Constitution of the United States, the laws of Congress, and the decisions of the Supreme Court."¹ This jurisdiction is not so restricted as to subjects cognizable therein, as was that of the English courts of admiralty, at the time of the revolution and attainment of American independence, nor, on the other hand, so extensive as that of the courts of the continental governments, exercising jurisdiction according to the principles of the civil law.²

This judicial power of the Federal courts over all cases of maritime and admiralty jurisdiction, is conferred upon the Federal government by the Constitution of the United States, and Congress cannot enlarge it.³ But it may be restricted, as is the case upon the western lakes, where it is by act of Congress restricted to steamboats and vessels engaged in commerce and navigation between ports and places in different States and territories.⁴

There are to be found, in *Allen v. Newberry*,⁵ indications of a different opinion in regard to the power of Congress to enlarge such jurisdiction, but as is said (CLIFFORD, J.,) in the case of *The Belfast*, "they were not necessary to that decision as the contract in that case was for the transportation of goods on one of the western lakes, where the jurisdiction in admiralty is restricted, by an act of Congress, to boats and other vessels * * * employed in the business of commerce and navigation between ports and places in different States and Territories."⁶

The admiralty jurisdiction of the United States was originally held to be limited to waters affected by the ebb and flow of the tide, as in England.⁷ But in the case of the *Genesee Chief*, the Supreme Court of the United States held that jurisdiction in admiralty did not depend in this country upon the ebb and flow of the tide, but upon the navigable character of the water; that if navigable, it was public, and if public, it comes within the scope of admiralty jurisdiction as conferred by Congress.⁸ Thus

¹ *The Belfast*, 7 Wall. 636.

² *Bags of Linseed*, 1 Black, 103; *The Belfast*, 7 Wall. 624, 636.

³ *The Belfast*, 7 Wall. 624, 641.

⁴ *Ibid.*

⁵ 21 How. 245

⁶ 7 Wall. 641.

⁷ *The Thomas Jefferson*, 10 Wheat.

428; *The Belfast*, 7 Wall. 637; *Waring v. Clarke*, 5 How. 441; 1 Conkling's U. S. Admiralty, 13, *et seq.*

⁸ *The Genesee Chief v. Fitzhugh*, 12 How. 457; *The Belfast*, 7 Wall. 639; *The Eagle*, 8 Wall. 21; *Fretz v. Bull*, 12 How. 468.

is the admiralty jurisdiction extended over all the public navigable waters of the country, in all its breadth, except as limited as hereinbefore stated upon the western lakes. This jurisdiction is exclusive in the district courts of the United States when the proceeding is *in rem*,¹ but where a common law remedy *in personam* is only sought, the jurisdiction as to the cause of action, but not as to the proceeding *in rem*, is concurrent in the courts of the States of the proper locality and jurisdictional character, and also in the circuit courts of the United States of the proper district, if the character of the parties as to citizenship and amount in controversy are such as to permit of jurisdiction in these courts. In the language of CLIFFORD, Justice, in the case of *The Belfast*, the party "may proceed *in rem* in the admiralty, or he may bring his suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State courts or in the circuit court of the United States, if he can make proper parties to give that court jurisdiction of his case."² Maritime jurisdiction in cases growing out of contracts, depends upon the nature of the contract; in cases of civil torts, it depends upon the locality where the act occurs.³ To confer admiralty jurisdiction of torts, they must occur upon the public navigable waters which are within the admiralty and maritime jurisdiction.⁴

Contracts, claims, and service touching rights and duties in relation to commerce and navigation on maritime waters, whether between ports of different States or of the same State, as for instance contracts of affreightment or for transportation of passengers, are of admiralty jurisdiction.⁵ For a breach of such contracts and for the infliction of such torts, maritime liens arise in favor of the injured party enforceable only in the United States district court; but they may be waived and a remedy pursued at

¹ *The Belfast*, 7 Wall. 624, 644; *The Moses Taylor*, 4 Wall. 411.

² 7 Wall. 664; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Baird v. Daly*, 57 N. Y. 236; *De Lovio v. Boit*, 2 Gall. 398; *The Lottawana*, 21 Wall. 558.

³ *The Belfast*, 7 Wall. 624, 637; *Railroad Co. v. Steam Towboat Co.*, 23 How. 215; *Steamboat Orleans v.*

Phœbus, 11 Pet. 175; *The Thomas Jefferson*, 10 Wheat. 428.

⁴ *The Belfast*, 7 Wall. 624, 637; *The Commerce*, 1 Black, 574.

⁵ *The Belfast*, 7 Wall. 624, 637; 1 *Conkling's Admiralty*, 19, 32; *Steamboat Orleans v. Phœbus*, 11 Pet. 184; *De Lovio v. Boit*, 2 Gall. 398; *Railroad Co. v. Steam Towboat Co.*, 23 How. 215.

common law *in personam* against the master or owners of the vessel or craft offending.¹

II. MARITIME LIENS.

The States have no power to create or enforce maritime liens *in rem*. The jurisdiction in that respect is exclusively in Congress and the national courts.² By Section 2 of Article III. of the Constitution, the judicial power of the United States is expressly extended "to all cases of admiralty and maritime jurisdiction," and Section 9 of the judiciary act of 1789 declares that the district courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," saving to suitors the common law remedy where the common law can give it.

This exclusive cognizance is exclusive of the State courts as well as of other Federal courts.³ Parties entitled to proceed as for a maritime lien *in rem* may do so in the district court of the United States, or if possessed of the requisite citizenship to enable them to sue in the United States circuit court, may waive the lien and proceed in the latter court *in personam* against the master or owners of the vessel; but there is no concurrent jurisdiction *in rem* in the State courts.⁴ In all cases where the maritime lien is sought to be enforced *in rem* the jurisdiction is exclusive in the district courts of the United States.⁵ If the party elect to proceed *in personam* in the circuit court of the United States instead of proceeding *in rem* in the district court,

¹ *Sturgis v. Boyer*, 24 How. 117; *Chamberlain v. Ward*, 21 How. 548; *The Belfast*, 7 Wall. 624, 643; *The St. Lawrence*, 1 Black, 522; *The General Smith*, 4 Wheat. 438; *The Reindeer*, 2 Wall. 384; *Manro v. Almeida*, 10 Wheat, 473.

² *The Belfast*, 7 Wall. 624; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192. See, also, *Desly's Shipping & Admiralty*, § 68, *et seq.*

³ *The Belfast*, 7 Wall. 624, 638; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390; *United States v. The Betsey*, 4 Cr. 442; *United States v. La Vengeance*, 3 Dall. 297; *The*

Octavia, 1 Wheat. 24; *The Samuel*, 1 Wheat. 9; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192.

⁴ *The Belfast*, 7 Wall. 624, 643. In *Trevor v. The Steamboat Ad. Hine*, the Iowa supreme court sustained the State court jurisdiction *in rem*, but the pleadings did not show the case to be one of maritime character. 17 Iowa, 349; *Vose v. Cockroft*, 44 N. Y. (5 Hand.) 415.

⁵ *People's Ferry Company v. Beers*, 20 How. 393, 402; *The Belfast*, 7 Wall. 624, 646; *The Moses Taylor*, 4 Wall. 411; *Weston v. Morse*, 40 Wis. 455; *The Lottawanna*, 21 Wall. 558.

as we have above seen he may do, when qualified in point of citizenship, the proceedings are the same in such cause as in other cases in said court at common law or suits not maritime; and if attachments are allowable under the State law, they may be resorted to in such suits as auxiliary to the proceedings *in personam*, as in other cases.¹

Maritime liens do not arise out of contracts to furnish materials and supplies for vessels in the home port; therefore, the States may, by law, create such liens as they deem proper in this class of cases, and may enforce the same in the State courts by all reasonable rules of law which do not amount to a regulation of commerce.² Contracts to build ships or for materials for ship building do not create maritime liens; they are not maritime contracts.³

III. MARITIME TORTS.

Maritime torts can only occur upon the water, and then only where such waters are under maritime jurisdiction. If an injury occur upon the land, it is not a maritime injury, or tort, although the immediate cause thereof, and proceeding from a maritime vessel lying in maritime waters, or from the negligence of the master or servants in charge of such vessel. To render it a maritime tort, both the injury and the wrong act that causes it must take place upon the water.⁴ In such case the jurisdiction of the tort *in rem* is exclusively in the United States court; but if the injury occur upon the land, then the jurisdiction is in the State courts, although the cause of the injury proceed from on board a maritime craft, in maritime waters.⁵ The case of the *Plymouth*, here cited, occurred in this wise: The steam propeller *Falcon*, a vessel navigating the great lakes, was anchored off the wharf in the Chicago river, in "navigable water," and while so anchored took fire from negligence of some of those having her in charge, which fire communicated itself to erections on shore

¹ *The Belfast*, 7 Wall. 624, 643, 645; *Sturgis v. Boyer*, 24 How. 110, 117; *Chamberlain v. Ward*, 21 How. 548, 553.

² *The Belfast*, 7 Wall. 624, 645, 646; *Roach v. Chapman*, 22 How. 129; *The Edith*, 4 Otto, 518; *Morrison v. Burns*, 40 Mo. 491; *Williams v. Tearney*, 8 S.

& R. 58; *The Jerusalem*, 2 Gall. 191; *Francis v. The Harrison*, 1 Sawyer, 355.

³ *Roach v. Chapman*, 22 How. 129.

⁴ *The Plymouth*, 3 Wall. 20; 1 Conkling's U. S. Admiralty, 32, *et seq.*

⁵ *Ibid.*

and destroyed the same and their contents. The Falcon was also destroyed. The owners of the shore property thus burned proceeded in admiralty, as for a marine tort, against the owners of the Falcon and attached the Plymouth, a vessel belonging to the defendants. The United States district court held that the case was not one coming within the admiralty jurisdiction, and dismissed it accordingly. On appeal, the supreme court of the United States affirmed the decision. NELSON, J., delivering the opinion of the court, said: "The cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction."¹

Vessels on the Mississippi river, plying from point to point of opposite shores in two different States, are within the admiralty jurisdiction, notwithstanding their principal business is that of ferrying between opposite sides of said river.²

IV. COMMON LAW JURISDICTION OF MARITIME CASES.

State courts have jurisdiction of personal actions growing out of maritime contracts by proceeding at common law, not for a lien, but for a personal recovery for breach of contract. Thus an action at law lies on a bill of lading for carriage of goods by a carrier upon maritime waters, from a port in one State to a port of another State, to recover damages for breach of the contract of carriage.³

They also have jurisdiction at common law against the person for personal injuries and other torts, if there is a common law remedy, and this whether the right of action be one at common law or be given by statute.⁴

The term "suits at common law," in the Federal Constitution, is used in contradistinction to equity proceedings and proceedings in admiralty, in which latter a mixture of public law, maritime law and equity are sometimes found in the same suit. The term does not contemplate such proceedings only as in form and

¹ 3 Wall. 36.

² The Gate City, 5 Biss. 200.

³ Home Ins. Co. v. Northwestern Packet Co., 32 Iowa, 223; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Waring v. Clarke, 5 How. 441; The Genesee Chief v. Fitz-

hugh, 12 How. 443; The Moses Taylor, 4 Wall. 441; The Belfast, 7 Wall. 624.

⁴ Dougan v. Champlain Trans. Co., 56 N. Y. 1, 6; Swarthout v. New Jersey Steam Nav. Co., 48 N. Y. 209.

practice conform strictly to those of the old common law. In other words, *proceedings at common law*, in their true sense, "embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."¹

To enable the common law courts of a State to exercise common law jurisdiction in admiralty cases, where a common law remedy exists, it is not necessary that the right of action should be one known to the common law; it is sufficient, though the right be given by statute, if it can be enforced by a common law proceedings.²

Where a party having a right of action in admiralty is willing to forego his right of proceeding *in rem*, and to proceed at common law for his remedy in a personal action against the parties liable thereto, he has his election so to do, and may, if he elects to proceed at common law, have his action in the proper State court;³ or, if the parties and amount in controversy be such as to bring the case within the common law jurisdiction of the United States circuit court, may bring his action in the latter court, at his election.⁴ Such action lies thus at common law, if the circumstances, as before stated, be such as to warrant it, as well if the right of action be one at common law, or one given by statute.⁵ The case here cited, of *Steamboat Co. v. Chase*, was an action for the death of a person while crossing a highway, given by a statute of Rhode Island, in cases where the death is caused by negligence of a common carrier. The deceased was crossing Narragansett Bay on a public highway, and was run over and killed by a steamer there plying as a common carrier. The supreme court of the United States held that the common law action lay therefor *in personam* against the owner of the vessel, under the statute. Though by the civil law it is otherwise, yet, under the maritime law of the United States, neither a

¹ *Parsons v. Bedford*, 3 Pet. 433, 446, 447.

² *Dougan v. Champlain Trans. Co.*, 6 Lans. 430; *S. C.*, 56 N. Y. 1.

³ 1 U. S. Stat. at Large, 76; *The Belfast*, 7 Wall. 666; *Baird v. Daly*, 57 N. Y. 236, 247; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Sturgis v. Boyer*, 24 How. 117; *Chamberlain v. Ward*, 21

How. 553; *Swarthout v. New Jersey Steam Nav. Co.*, 48 N. Y. 209.

⁴ *Steamboat Co. v. Chase*, 16 Wall. 522; *Sturgis v. Boyer*, 24 How. 117; *Chamberlain v. Ward*, 21 How. 553.

⁵ 16 Wall. 522; *Baird v. Daly*, 57 N. Y. 236, 247; *Swarthout v. New Jersey Steam Nav. Co.*, 48 N. Y. 209.

contract to *build* a ship, or to furnish materials for that purpose, is a *maritime* contract; and causes of action resting on such contracts do not come within the jurisdiction of the United States court, under that clause of the Constitution which declares, in substance, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.¹ Such contracts to *build*, and to furnish *material* with which to *build* ships, are within the jurisdiction of the State courts, and the purview and force of State laws giving liens for security of payment for labor and materials thus furnished and bestowed, as also within the rules and regulations provided by such State laws for their enforcement, which do not amount to a regulation of commerce.²

¹ *Edwards v. Elliott*, 21 Wall. 532, 556, 557; *Roach v. Chapman*, 22 How. 129.

² *Edwards v. Elliott*, 21 Wall. 532, 555, 556, 557; *The Belfast*, 7 Wall. 645; *Sheppard v. Steele*, 43 N. Y. 55.

CHAPTER XXIX.

INTER-STATE COMMERCE.

- I. THE TERM COMMERCE. POWER TO REGULATE INTER-STATE COMMERCE.
- II. UNTIL CONTROLLED BY CONGRESS IT IS FREE.
- III. STATE REGULATION OF VESSELS ENGAGED IN COMMERCE. TAX OF COMMANDERS, AND OF ARRIVALS AND INTER-STATE PASSENGERS BY LAND AND BY WATER.
- IV. STATE PROPERTY TAX OF VESSELS ENGAGED IN INTER-STATE COMMERCE.
- V. PILOTAGE.
- VI. WAREHOUSING AND ELEVATING.
- VII. STATE CONTROL OF BAYOUS AND SLOUGHS OF RIVERS.

I. THE TERM COMMERCE. POWER TO REGULATE INTER-STATE COMMERCE.

Commerce is a term of comprehensive import. It includes intercourse, for the purposes of trade, in any and all forms. The power to regulate, say the supreme court of the United States, "embraces all the instruments by which such commerce may be conducted."¹ Where the subjects are local in their nature, it has been held that the States may provide regulations until Congress acts in reference thereto;² but where the subject is of a national character, or such as to admit of uniformity of regulation, the power is in Congress, *exclusive* of all State authority.³

Under the Control of Congress. The Constitution of the United States places commerce between the several States exclusively within the control and regulation of Congress. Congress,

¹ *Welton v. Missouri*, 1 Otto, 275. And see, to same effect, *The Pensacola Telegraph Co. v. The Western Union Telegraph Co.*, 6 Otto, 1.

² *Welton v. Missouri*, 1 Otto, 275; *Sherlock v. Alling*, 3 Otto, 99; *U. S. v. Bevans*, 3 Wheat. 337; *The Lotta-*

wanna, 21 Wall. 568, 581; *Ex parte McNeil*, 13 Wall. 236, 240; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

³ *Welton v. Missouri*, 1 Otto, 275, 280.

alone, has power to regulate commerce among the States.¹ Any impediment imposed by a State upon commerce with other States is unconstitutional and void. Thus, a State law levying a stamp duty on exports is unconstitutional as a tax upon exports, and is of no force whatever.² This power to regulate commerce conferred upon Congress by the Constitution, is not confined to the means of carrying on the same which were known and used at the time the Constitution was adopted. This power was not conferred for a particular time, but for all times. It is commensurate with the increased subjects of commerce as the same increase from time to time, and extends in like manner to all new appliances and means used in carrying on the same.³ In the language of the United States supreme court, WAITE, C. J., such powers "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse, with its rider, to the stage coach; from the sailing vessel to the steamboat; from the coach and steamboat to the railroad; and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times, and under all circumstances."⁴ It is thus held that not only the ordinary means of inter-State *transportation* and *traffic*, but also the means of inter-State *communication*, as the electric telegraph, are within the power thus bestowed upon Congress by the Constitution, and that no State can confer on any one a monopoly of the telegraphic business within

¹ Sec. 8, Article I. Cons. U. S.; *Brown v. Maryland*, 12 Wheat. 419, 425, 444; *Welton v. Missouri*, 1 Otto, 275; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Almy v. California*, 24 How. 169; *Gibbons v. Ogden*, 9 Wheat. 1; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *Passenger Cases*, 7 How. 283; *Council Bluffs v. Kansas City, etc., R. R. Co.*, 45 Iowa, 338, 349; *State Freight Tax Case*, 15 Wall. 232; *Railroad Co. v. Husen*, 5 Otto, 465; *Inman Steamship Co. v. Tinker*, 4 Otto, 238; *State Tonnage Tax Cases*, 12 Wall. 204; *Cannon v. New Orleans*, 20 Wall.

577; *Foster v. Master, etc., of Port of New Orleans*, 4 Otto, 246.

² *Almy v. California*, 24 How. 169.

³ *Pensacola Telegraph Co. v. The Western Union Telegraph Company*, 6 Otto, 1.

⁴ *Pensacola Telegraph Co. v. The Western Union Telegraph Co.*, 6 Otto, 1. A like principle is asserted in the case of the *Genesee Chief*, 12 How. 443, in regard to admiralty jurisdiction, and is sustained in all subsequent rulings on the subject; that having now become a leading case.

any part of its territorial jurisdiction.¹ It is so regarded as an instrument of commercial intercourse, upon the same principle as is the postal service and intercourse of the United States regarded and treated in law as such.²

II. UNTIL CONTROLLED BY CONGRESS, IT IS FREE.

No State may in any manner fetter or obstruct *inter-State* commerce, or discriminate injuriously against the products or trade of other States, or against the rights of their citizens, although Congress has not exercised its privilege of regulating such intercourse or trade. Until Congress exercises its authority upon the subject, *inter-State* commerce is free.

In the language of the United States supreme court, "its inaction on the subject, when considered with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled."³

In the case just cited, it was held that a statute of Missouri is void which discriminates between the sale in that State of goods or property not the product of the State, and the sale of goods and property the product of the State, by requiring a license for sale of the former and not for the latter, and making the sale of such foreign products without a license a penal act, subjecting the party to a penalty.⁴

The case of *Railroad Company v. Husen*⁵ was one brought by Husen against the Hannibal & St. Joe Railroad Company in a State court of Missouri, for alleged damages caused by a violation by said company of an act of the legislature of that State in relation to the introduction of Mexican, Texas or Indian cattle into said State. The first section thereof reads as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain in, any county in this State between the first day of March and the first day of November in

¹ *Supra*.

² *Ibid*.

³ *Welton v. Missouri*, 1 Otto, 275, 282; *Van Buren v. Downing*, 41 Wis. 122.

⁴ *Welton v. Missouri*, 1 Otto, 275. So, likewise, of a similar Maryland statute. *Brown v. Maryland*, 12

Wheat, 425, 444; *Van Buren v. Downing*, 41 Wis. 122. The court following in this last case the ruling in the *Welton v. Missouri*, and disavowing accordingly the prior ruling in *Wisconsin*, in *Morrill v. The State*, 33 Wis. 428.

⁵ 5 Otto, 465.

each year by any person or persons whatsoever; *provided*, that nothing in this act shall apply to any cattle which have been kept the entire previous winter in this State; *provided, further*, that when such cattle shall come across the line of this State, loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owner of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such route shall be *prima facie* evidence that such disease has been communicated by such transportation." Another section thereof is: "If any person or persons shall bring into this State any Texas, Mexican or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." The defense was placed mainly upon the unconstitutionality of the law. The highest State court held it to be constitutional, and the case having been taken on error to the United States supreme court, the act of the assembly was there held to be unconstitutional, as violating that part of the United States constitution which vests in Congress the exclusive power to regulate commerce with foreign nations and among the several States, and with the Indian tribes. It was held to be "a plain regulation of *inter-State* commerce, a regulation extending to prohibition." In reference to the attempt to sustain the validity of the State statute as matter of police, the United States supreme court concede the power in the local government to make quarantine and health regulations, and to exclude from introduction into its limits, convicts, paupers, idiots, lunatics and other persons likely to become a public charge, and persons afflicted with contagious and infectious diseases, as a right founded in the law of self defense, and in like principles the right to exclude property dangerous to the property of the inhabitants of the State; but that whatever such power of police might be, it could not be exercised by a State over subjects confided exclusively to Congress by the Federal constitution. That whenever a statute of a State invades the domain of legislation which belongs exclusively to Congress, it is void, no matter under what class of powers it may fall, or how

closely allied it may be to powers conceded to belong to the States.¹ The ruling of the supreme court of Illinois in favor of the constitutionality of a similar statute was referred to, but not regarded with approbation by the United States supreme court.

State Discrimination Between Residents and Non-Residents. So, an act of a State legislature is void which discriminates against non-residents and in favor of residents of the State as to the terms upon which they may engage in buying and selling articles of commerce and merchandise in such State. Such discriminating legislation violates Section 2 of Article IV. of the Constitution of the United States, which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.²

And where such statute imposes a penalty for its violation recoverable by indictment and trial in the State court, error lies from such conviction to the supreme court of the United States, if on the trial the validity of such statute is drawn in question under the Federal constitution in the highest State, in which a decision in the case could be had, and the decision of such highest State court is in favor of the validity of the statute.³

A distinction is made, as we have before seen, in regard to the rights arising under said Section 2 of Article IV. of the Constitution, in this: That while *legal* entities, as corporations, for instance, are held to be so far citizens as to entitle them to the benefit of some other provisions thereof, that the section above referred to applies to natural persons only.⁴

Inhibition of State Interference. This inhibition to State interference extends to and protects such property as is transported into a State as articles of commerce from all hostile or interfering legislation until it has mingled with and has become a part of the general property of the country, and as such is subjected alike to similar protection and to no greater burdens.⁵

¹ Railroad Co. v. Husen, 5 Otto, 465, 471, 472. See, also, Henderson v. Mayor of New York, 2 Otto, 259; Gibbons v. Ogden, 9 Wheat. 1; Chy Lung v. Freeman, 2 Otto, 275; Welton v. Missouri, 1 Otto, 275; Passenger Cases, 7 How. 283. See, also, a report of the case of Railroad Co. v.

Husen, 6 Cent. Law Journal, 172, and note criticising the opinion.

² Ward v. Maryland, 12 Wall. 418, 429, 432.

³ Ibid. 1 U. S. Stat. at Large, 85.

⁴ Paul v. Virginia, 8 Wall. 168.

⁵ Welton v. Missouri, 1 Otto, 275, 281; Cook v. Pennsylvania, Chicago

State Police. But this power conferred on Congress is not intended to prevent the States from legislating on all subjects relating to the health, life and safety of their citizens, although such legislation might indirectly affect the commerce of the country.¹

III. STATE REGULATION OF VESSELS ENGAGED IN COMMERCE. TAX OF COMMANDERS, AND OF ARRIVALS — AND OF INTER-STATE PASSENGERS, BY LAND AND BY WATER.

State laws assuming to regulate the movements of vessels navigating the waters of the State, when such vessels are licensed and enrolled under the laws of the United States are unconstitutional and void, except such laws as are of a police character. Hence a State law requiring of the owners or masters of such vessels the filing of a statement in writing in a designated State office, setting forth the name of the vessel, the name of the owner or owners, his or their place of residence, and interest of each owner, before leaving a port of the State, and under a specified penalty, is void, as conflicting with the constitution and also with the acts of Congress regulating commerce and the coasting trade.²

State Police. But the power of the States to make inspection, quarantine, and other necessary local regulations of a police nature not affecting commerce or the instrument of commerce, exists as matter of domestic police.³

State laws imposing a payment of a sum of money upon vessels engaged in commerce, and plying between the ports of such State and those of another State, for each arrival, and for the benefit

Legal News, Vol. XI. p. 65, U. S. S. Ct. October Term, 1878. By this case a State tax on auction sales of goods from another State while yet in the original packages, was held equally within the prohibition.

¹ *Sherlock v. Alling*, 3 Otto, 99, 103; License Cases, 5 How. 504; *Bode v. State*, 7 Gill. 326; *Kettering v. Jacksonville*, 50 Ill. 39; *Thomason v. State*, 15 Ind. 449; License Tax Cases, 5 Wall. 462; Passenger Cases, 7 How. 283.

² *Sinnot v. Davenport*, 22 How. 227;

Foster v. Davenport, 23 How. 244. So, likewise, a State law levying a stamp duty upon bullion, money, or property carried out of the State, is void as violating the constitution and conflicting with the enactments of Congress, in relation to commerce, the coasting trade, and intercourse among the States, and as a tax upon exports. *Almy v. California*, 24 How. 169.

³ *Steamship Company v. The Port Wardens*, 6 Wall. 31.

of port officers without service performed or offered therefor, is unconstitutional and void, as amounting to an interference with commerce between the States.¹ The case is not like one arising under the law of pilotage, by which pilots are compelled to go out and offer service to incoming vessels, and if service be refused from the pilot first offering it, entitling such pilot to half pilotage. In the latter case, the law compels the offer of service, and if declined, gives to the party tendering it half pilotage as compensation for the labor and risk of making the offer, and the same law implies a contract on the part of the shipowner or master to pay it.² But the imposing of a sum certain upon vessels for each arrival without any consideration in return is a tax, and to the extent imposed, operated directly in restraint of commerce. In the language of the United States Supreme Court in the *Steamship Company v. Port Wardens*,³ it "works the very mischief against which the constitution intended to protect commerce among the States."

State Capitation Tax on Inter-State Travelers. So, a State law is unconstitutional and void which imposes a capitation tax upon a person leaving the State by railroad, stage coach or other vehicle engaged or employed in the business of transporting passengers for hire, collectable of the proprietors or owners and corporations so engaged in transporting passengers.⁴ Such a law strikes at the right of the people to have free ingress or egress to and from and through all the States and Territories composing our common government, and also at the right of that government to require and enforce their presence into and out of such States and Territories, and to cause them to pass through the same on such occasions as national exigencies may require within the constitutional powers of such government.⁵

State Tax on Commanders of Vessels or Passengers. And equally obnoxious to the constitution are State laws assuming to enforce a tax for any purpose whatever upon commanders of vessels, foreign or inter-State, or on passengers thereon, coming

¹ *Steamship Company v. The Port Wardens*, 6 Wall. 31.

² *Steamship Company v. Port Wardens*, 6 Wall. 31; *Ex parte McNeil*, 13 Wall. 236; *Steamship Company v. Joliffe*, 2 Wall. 450; *Cooley v. Ward-*

ens of Philadelphia, 12 How. 299.

³ *Supra*.

⁴ *Crandall v. Nevada*, 6 Wall. 35; *Passenger Cases*, 7 How. 283.

⁵ *Crandall v. Nevada*, 6 Wall. 35, 48.

into ports of the State. Such laws are in direct violation of the provisions of the United States constitution, which confers upon the national Congress the exclusive power of regulating foreign commerce and commerce between the States, and which prohibits the States from imposing import duties and exports.¹ The cases of *Smith v. Turner* and *Norris v. City of Boston*, known as the Passenger Cases, here cited, arose in this way: New York passed a law requiring for hospital purposes the payment of a tax by the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar. And from the master of each coasting vessel, for each person on board, twenty-five cents; except coasting vessels from New Jersey, Connecticut and Rhode Island, which were required to pay for no more than one voyage in each month. Said law also purported to empower the master in all such cases to collect such sums from the persons on whose account he was thus assessed. Smith, the master of a British ship, having landed passengers from a foreign port in New York, and refusing to pay such tax, was sued by the health officer, Turner, for the amount thereof. To the right of recovery defendant demurred on the ground of the unconstitutionality of the statute. Judgment was rendered thereon by the highest State court of New York, for the plaintiff, after overruling the demurrer. The case having gone to the United States Supreme Court, it was there held, McLEAN, Justice, delivering the opinion, that the statute assumed to regulate foreign commerce, and was void as in conflict with that clause of the United States constitution which confers upon the national Congress the exclusive power to regulate commerce with foreign nations and among the several States.² In this connection the learned court say: "A tax or duty upon tonnage, merchandise, or passengers, is a regulation of commerce, and cannot be laid by a State except under the sanction of Congress and for the purposes specified in the constitution." *Norris v. The City of Boston*, grew out of similar legislation by the State of Massachusetts, assuming not only to levy and collect a tax upon passengers arriving by ship from foreign ports, but also to exclude from the privilege of landing certain of such passengers, as

¹ Passenger Cases, 7 How. 423.

² Passenger Cases, 7 How. 283, 408.

lunatics, idiots and other specified objectionable persons. The plaintiff, Norris, an inhabitant of St. John, in the British dominion, arrived in the port of Boston with and in command of a schooner which had foreign passengers on board, and the tax being demanded on such passengers by the Massachusetts authorities, was, by the said commander, paid under protest, and suit was brought to recover back the amount paid, against the city of Boston in the common pleas court. Judgment was rendered for the defendant, which judgment was affirmed by the Supreme Court of the State. The Supreme Court of the United States held the law to be unconstitutional for like reasons as in *Smith v. Turner*, and both cases were by the Supreme Court of the United States, *reversed*.¹

IV. STATE PROPERTY TAX OF VESSELS ENGAGED IN INTER-STATE COMMERCE.

State Taxation at the Home Port. Though commerce between the States is not a subject of State taxation, yet the vehicles or instruments of local commerce used or engaged in carrying it on, as, for instance, steamboats or other means of transportation, are. Their *situs* is at the home port, and they are taxable by the State within which that port is situated just as other movable property is there taxable. Such home port is the port nearest to which the owner, husband, or managing agent usually resides in, in the district of their registry. They are not within the jurisdiction of the other States between whose ports or in whose waters they ply only temporarily, and are not there subject to State taxation any more than travelers of other States would be in passing through and stopping temporarily on business. Vessels thus employed do not become blended with the taxable interests or property of the States in which they temporarily touch, or do business, in their accustomed routes. In the language of HUNT, J., a vessel so employed is "engaged in inter-State commerce, with her home port still remaining unchanged and the property continuing unmixed with the permanent property of either State" so visited.² Vessels thus engaged are free to come and

¹ Passenger Cases, 7 How. 283, 408.

² *Morgan v. Parham*, 16 Wall. 471, 478; *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis v. The*

Ferry Co., 11 Wall. 423; *People v. Commissioners of Taxes*, 58 N.Y. 242; *People v. Commissioners of Taxes*, 23 N.Y. 224.

free to go, and are not, in law, liable to be interfered with in the ports of the different States to which they ply, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belong the regulation of commerce between the States.¹ If this were not so, then aside from the indirect effect upon the inter-State commerce which the hindrance and delay, occasioned by claims to local taxation, might occasion, there would result inexplicable difficulties to the owners by the conflicting claims of taxation set up in the different States in whose ports they enter. The circumstances, in the case of *Morgan v. Parham*, were these: A vessel engaged in the coasting, or inter-State commerce, between Mobile and New Orleans, but which before so engaging was duly registered in the port of New York under the ownership of the plaintiff, Morgan, was seized for taxes by the tax collector of the city of Mobile for taxes levied upon her by said city. The owner, Morgan, brought an action of trespass for the seizure against the officer, and the cause being decided in favor of the defendant, and the legality of the tax asserted by the court, the case went to the supreme court of the United States, and judgment was there reversed, that court ruling as herein before stated that the vessel was taxable only at the home port of the owner. The case here cited of *Hays v. The Pacific Steamship Co.*² was of a similar character, and originated out of an effort of the authorities of the State of California to tax the steamships of said company, registered in New York, and plying and carrying freight and passengers in connection between *New York* and *San Francisco*. The effort at taxation was held to be illegal.

So of Ferryboats at Inter-State Ferries. So ferryboats belonging to a corporation of one State, employed and used in ferrying persons and property from and to such State, across a navigable river to and from another State, at the opposite shore of such river, and making such opposite shore a mere landing place and terminus for discharging and receiving persons and property so carried or to be carried across said river, are not subject to local taxation by the authorities of such latter State, or of any of its municipal governments of towns or cities at which said boats

¹ *Morgan v. Parham*, 16 Wall. 471; 17 How. 596.
Hays v. Pacific Mail Steamship Co., ² 17 How. 596.

thus land.¹ Their home *situs* is in the State where the corporation owning and thus employing them resides and exists, which is in the State wherein the corporation is by law created,² and in that State only, while thus employed, they are liable *as property* to be taxed.³

The Wiggins Ferry Company, a private corporation created under the laws of the State of Illinois, was engaged in ferrying persons and property across the Mississippi river, between the Illinois shore of said river and the opposite shore thereof, in the State of Missouri. The boats, when not running, were kept at the Illinois shore, and when running, their stoppage at the Missouri shore was limited in time by the St. Louis city authorities, and was merely temporary, to put off and take on persons and property transported or to be transported across the river from one State to the other. But the boats were registered, under the United States laws, at the registry office in St. Louis. That city assumed the right to tax said boats *as property*, which was resisted by the ferry company by legal proceedings in the circuit court of the United States for the district of Missouri. Said circuit court of the United States held that the tax was illegal, and on error to the supreme court of the United States that court affirmed the decision of the court below, and held that as property the boats were taxable only in the State of Illinois, where, in fact, it appeared that a tax was paid upon them. SWAYNE, J., delivering the opinion of the court, says:⁴ "The owner was, in the eye of the law, a citizen of that State (Illinois), and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city (St. Louis) as to become incorporated with, and form a part of, its personal property.⁵ Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained."⁶

¹ St. Louis v. The Ferry Co., 11 Wall. 423, 432.

² Ibid.

³ Ibid.

⁴ 11 Wall. 431, 432.

⁵ Citing here Hays v. Pacific Steamship Co., 17 How. 596; New Albany v. Meekin, 3 Ind. 481.

⁶ Here citing Railroad Company v. Jackson, 7 Wall. 262.

V. PILOTAGE.

The regulation of pilotage of sea-going vessels in national waters of a State, though a subject which Congress has a right, under the national constitution, to assume and exercise the exclusive control of, is nevertheless one that may be exercised by a State until Congress shall see fit to act upon the subject.¹ When so acted on by Congress, the authority of the State retires and lies in abeyance until there is a recurrence of the occasion for its exercise.²

Half Pay when Service Declined. State laws regulating pilotage, where such occasion exists for them, are valid, and a provision that gives half pay to a pilot who is first to tender his service and is refused, is a reasonable regulation, that is enforceable in the United States court as arising out of the commercial marine, although the law upon which the claim to such pay is based be a statute passed by a State.

Such right of recovery is not as for a tort, but as matter of contract. The law fixes the compensation for services and compels the pilot to offer to serve. If his service is declined, the same law fixes his compensation for the labor performed and time consumed, and risks incurred in going out, and implies a promise on the part of the ship owner or master to pay the same, and gives a lien on the vessel for the amount.³

Jurisdiction of Federal Court. The jurisdiction of the Federal court over the subject is not by virtue of the State law, for a State law cannot confer jurisdiction on a national court. That jurisdiction is in virtue of the subject matter being of maritime concern, and the only effect of the State law is to invest the party with a right of action; that is, a right to recover the legal compensation fixed in such cases thereby.⁴ The enforcement thereof may be in any court competent to take jurisdiction of the subject matter. Hence this has sometimes been done in the State courts.

¹ *Cooley v. Wardens of Philadelphia*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236; *Gilman v. Philadelphia*, 3 Wall. 713; *Steamship Co. v. Port Wardens*, 6 Wall. 31; *Steamship Co. v. Joliffe*, 2 Wall. 450.

² *Ex parte McNiel*, 13 Wall. 236, 240.

³ *Ex parte McNiel*, 13 Wall. 236; *Steamship Co. v. Joliffe*, 2 Wall. 450.

⁴ *Ex parte McNiel*, 13 Wall. 236, 243; *Hobart v. Drogan*, 10 Pet. 108, 120.

VI. WAREHOUSING AND ELEVATING.

But the legislatures of the States may regulate the business of warehousing and elevating of grain, when such warehouses and elevators are situated clearly within the territorial limits of the respective States assuming to regulate the same, notwithstanding the grain be in course of inter-State transportation, or is intended to be carried out of one State into or through another State, and notwithstanding such regulation, and the costs and expenses incident thereto, may indirectly affect the value of the property, or profits thereof; but the State cannot in any manner interfere with its inter-State carriage or traffic.¹

VII. STATE CONTROL OF BAYOUS AND SLOUGHS OF RIVERS.

The bayous and sloughs of great and navigable rivers, such as is the Mississippi River, which are not required by the interests of commerce to be preserved for the purposes of navigation, are under the control of the governments of States in which they are situated. The obstruction of them by the city authorities of such States, within the corporate limits of cities, for purposes of local improvement, is not an interference with commerce between the States, nor a violation of the ordinance and laws respecting the freedom of navigation of such rivers, or declaring them common highways, although such bayous and sloughs be susceptible of being navigated.²

¹ *Munn v. Illinois*, 4 Otto, 113. See Cooley on Const. Limitations, 4th ed. 742, *et seq.*

² *Ingraham v. Chicago, D. & M. R. Co.*, 34 Iowa, 249; *People v. St. Louis*, 10 Ill. 350.

CHAPTER XXX.

STATE TAXATION OF NATIONAL BANKS, BONDS AND CREDITS.

- I. STATE TAXATION OF NATIONAL BANKS AND SHARES OF STOCK IN THE SAME.
- II. STATE TAX ON NATIONAL BONDS OR CREDITS.
- I. STATE TAXATION OF NATIONAL BANKS AND SHARES OF STOCK IN THE SAME.

Capital Stock. The capital stock of national banks, consisting in part, or as a whole, of stocks or bonds of the national government, is, upon general principles, not a legitimate subject of State or municipal taxation.¹

Lands Taxable. But the lands of the corporation may be taxed, as other lands are taxed; they do not partake of the character of government securities, as does the capital, which consists of, or rests upon, the bonds of the government.²

The tax upon the capital at an aggregate valuation, is a tax upon the bonds, or property in which the capital is invested, as contradistinguished from the privileges and franchises enjoyed within the State:³

Shares of Stock Taxable. But the *shares* of such bank, of capital stock, are subject to taxation, for State and municipal purposes, in the States wherein the banks are located, at a rate not greater than is assessed upon other moneyed capital, belong-

¹ Collins v. Chicago, 4 Biss. 472; National Bank v. Commonwealth, 9 Wall. 353; Bradley v. The People, 4 Wall. 459; People v. Commonwealth, 4 Wall. 244; Van Allen v. The Assessors, 3 Wall. 573.

² Bank of Commerce v. Comm. of Taxes, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Collins v. Chicago, 4 Biss. 472; Pittsburgh v. First National

Bank, 55 Penn. St. 45; Bradley v. The People, 4 Wall. 459; Osborn v. Bank of U. S., 9 Wheat. 738; Morsemann v. Younkin, 27 Iowa, 350; National State Bank of Oskaloosa v. Young, 25 Iowa, 311.

³ Van Allen v. The Assessors, 3 Wall. 573; Bradley v. The People, 4 Wall. 459.

ing to individual citizens of the State, and not in excess of the rate of taxation imposed upon the shares of banks organized under authority of the State. They are the property of the individual *shareholders*, and not the property of the corporation, or bank; while, on the other hand, the *capital* of the bank is the property of the corporation or bank itself.¹ Inasmuch as such taxation of the *shares* of national bank stock is not to be in excess of that levied upon *shares* of banks existing under the law of the State, it has been held that if none be enforced on the shares of the local banks, therefore none can be imposed upon the *shares* of national banks for the time being. Thus, where the local banks were taxable on their capital, the shares not being taxed as such, the ruling was that no tax could be enforced upon the shares of the national banks.² This, however, is a matter so easily obviated by the States resorting to taxation of the individual shares of the local or State banks, that the obstacle in that respect to taxation of shares of the national banks is merely temporary.

The Shareholder Tax May be Collected Through the Bank. The tax thus authorized to be enforced upon the shares of national bank stock is, by the act of Congress, made payable where the bank is situated;³ and, to that end, it is lawful to require payment thereof at the hands of the bank itself; for as such tax is allowable upon the shares as well of non-residents as residents of the State, there would be difficulty in enforcing the tax direct from the non-resident owner of a share or shares.⁴

It is the general method of State taxation of shares of local banks, to which like taxation of shares in national banks is

¹ *Morseman v. Younkin*, 27 Iowa, 350; *Hubbard v. Supervisors*, 23 Iowa, 130; *Lauman v. Des Moines County*, 29 Iowa, 310. But such State taxation of shares cannot be enforced under a law of the State subjecting the *capital* of such banks to taxation. The power to tax the capital the State does not possess, and the power to tax the shares, though it exist, cannot be enforced without a law providing therefor.—*Ibid.* *Van Allen v. The Assessors*, 3 Wall. 573; *People v. The Commissioners*, 4 Wall. 244; *Bradley v.*

The People, 4 Wall. 459; *National Bank v. Commonwealth*, 9 Wall. 353.

² *Bradley v. The People*, 4 Wall. 459; *Hubbard v. Supervisors*, 23 Iowa, 130; *Van Allen v. The Assessors*, 3 Wall. 573.

³ Act of June 3, 1864, U. S. Stat. at Large, Vol. 15, 34; 2 Brightley's Dig. p. 67; R. S. of U. S. 1874, § 5219, p. 1015.

⁴ *Lionberger v. Rouse*, 9 Wall. 468; *National Bank v. Commonwealth*, 9 Wall. 353.

required to conform, and *exceptionable cases do not deprive a State of power to tax under the act of Congress.*¹ It is not understood that the power thus to tax the shares of stock in the national banks is *conferred* upon the States by said act of Congress, but that such power being concurrent in the State and Federal governments, as to corporations created under authority of the latter, when the paramount right of the latter is not asserted, that by the act of Congress merely the intent of Congress not to exercise the power, but to leave it with the States for the time being, is avowed;² thus leaving in the State the exercise of the privilege until Congress, as it may at any time do,³ asserts and assumes to exercise the national paramount authority and jurisdiction over the subject.

II. STATE TAX ON NATIONAL BONDS OR CREDIT.

Likewise, State laws taxing bonds of the national government, or other means devised or employed by it for carrying out its constitutional powers and functions, are unconstitutional and void. This inhibition against State taxation applies to every species and form of indebtedness of the national government resorted to or used for, the purpose of carrying out, or in the course of executing the powers invested in it by the Constitution.⁴

The power of the States to impose and collect taxes is co-extensive only with their sovereign power over property interests and things within their own territorial limits, and constitutional sphere of action. That is, to every thing and interest that exists by State authority or permission, but does not extend to those means originated and employed by Congress to carry into execution those powers conferred on that body and the national government by the Constitution and people of the United States. Among those powers is the power to borrow money on the credit

¹ *Lionberger v. Rouse*, 9 Wall. 463.

² *Van Allen v. The Assessors*, 3 Wall. 573, 585.

³ *Gilman v. Philadelphia*, 3 Wall. 713, 731, 732. But "Congress may interpose, whenever it shall be deemed necessary, by general or special laws." *Ibid.* 732.

⁴ *Weston v. Charleston*, 2 Pet. 449;

McCulloch v. Maryland, 4 Wheat. 316; *Brown v. Maryland*, 12 Wheat. 419; *The Banks v. The Mayor*, 7 Wall. 16; *Bank of Commerce v. Commissioners of Taxes of New York*, 2 Black, 620, 628; *Bank Tax Case*, 2 Wall. 200; *Bank v. The Supervisors*, 7 Wall. 26. See, further, *Cooley on Taxation*, 56, *et seq.*

of the United States. To allow State taxation of government stocks or bonds in the hands of individuals, or other means resorted to by the government to carry out its functions and maintain its constitutional authority, would put it in the power of the States to obstruct, retard and cripple the national power, by depreciating the credit of the government and placing local difficulties in the way of its constitutional action.¹ The case of *Weston v. The City of Charleston*,² cited above, originated in an attempt of that city to tax United States stocks issued for money loaned, in the hands of Weston. The supreme court of the United States, MARSHALL, J., say, in delivering the opinion in that case: "The tax on government stock is thought, by this court, to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

¹ *McCulloch v. Maryland*, 4 Wheat. 316; *Weston v. Charleston*, 2 Pet. 449.

² 2 Pet. 469.

CHAPTER XXXI.

BANKRUPTCY.

- I. EFFECT ON JURISDICTION OF STATE COURT.
- II. FIXED LIENS.
- III. STATE INSOLVENT OR BANKRUPT LAWS.
- IV. STATE INSOLVENT LAWS. HOW AFFECTED BY NATIONAL BANKRUPT LAW.

I. EFFECT ON JURISDICTION OF STATE COURTS.

Civil Proceeding Arrested in State Court. Proceedings in bankruptcy in the district court of the United States arrest all ordinary civil proceedings pending and undecided in the State courts, except those upon contract liens and upon attachments, where the latter have been commenced not less than four months next preceding the inception of the proceedings in bankruptcy.¹

Attachments. Attachment proceedings against the bankrupt, commenced more than four months before the commencement of the proceedings in bankruptcy, are no further affected thereby than to prevent a judgment *in personam* against the defendant for the time being, before decision as to his final discharge; and if discharged, then to prevent such personal judgment entirely; but the attached property, if liability be established, may be sold, or enough thereof, to discharge such liability and costs, by judgment of the State court, as in case no bankrupt proceedings were pending.²

In attachment proceedings in a State court instituted less than four months before the commencement of the bankrupt proceedings in the Federal court, the effect of the latter is to dissolve the

¹ 14 U. S. Stat. at Large, 522; R. S. of U. S. of 1874, § 5044; *In re Paterson Nat. Bank*, Reg. Sup. to Vol. 1, 27; *Hatch v. Seeley*, 37 Iowa, 493; *Blumenstiel on Bankruptcy*, 187.

² *Bates v. Tappan*, 3 Nat. Bank. Reg.

159; Same Cases, 99 Mass. 376; *Sampson v. Burton*, 4 Nat. Bank. Reg. 1; *Bowman v. Harding*, 56 Maine, 559; *Leighton v. Kelsey*, 57 Maine, 85; *Hatch v. Seeley*, 37 Iowa, 493; *Blumenstiel on Bankruptcy*, 189.

attachment and arrest the proceedings in the State court, and to bring under jurisdiction of the United States court the subject matter thereof, placing the plaintiff in attachment on the same footing of equality as other creditors, who have no lien, and vesting in the assignee in bankruptcy the property which was previously held by the attachment.¹

II. FIXED LIENS.

Creditors having fixed liens on property of the bankrupt, as mortgages, for instance, or judgment liens acquired in good faith, may enforce them in the State court, if not redeemed by the assignee;² but the assignee may redeem the property from such lien for the benefit of the general fund and creditors, or the bankrupt court may proceed to sell such property, subject to the lien.³ But no personal judgment can be taken in the State court against the bankrupt during pendency of the bankrupt proceedings in the United States court.⁴

III. STATE INSOLVENT OR BANKRUPT LAWS.

The several States may pass bankrupt or insolvent laws, provided they do not conflict with such as are passed by Congress; but no State can, by any such law, release or impair, or provide for the release or impairing, of the obligation of contracts. Such State laws may act upon the person of debtors, so as to discharge from duress of law, or liability to arrest or duress for existing debts or obligations, but cannot destroy the obligation or release the subsequently acquired property of the debtor from liability to pay the same.⁵ This statement of the general law, however,

¹ 14 U. S. Stat. at Large, 522; R. S. of U. S., 1874, § 5044; *In re Preston*, 6 Nat. Bank. Reg. 545; *Corner v. Malory*, 31 Md. 368; *In re Patterson*, 1 Nat. Bank Reg. Sup. p. 27; *Bates v. Tappan*, 3 Nat. Bank. Reg. 159; *Leighton v. Kelsey*, 57 Maine, 85; *Bowman v. Harding*, 56 Maine, 559; *In re Brand*, 3 Nat. Bank. Reg. 85; *In re Housberger*, 2 Ibid. 33; *In re Joslyn*, 3 Ibid. 118; *In re Williams*, 3 Ibid. 74; *Hatch v. Seeley*, 37 Iowa, 493; *Stuart v. Hines*, 33 Iowa, 60.

² *Bates v. Tappan*, 3 Nat. Bank. Reg. 159; *Brown v. Gibbons*, 37 Iowa, 654, 657; *Bowman v. Harding*, 4 Nat. Bank. Reg. 5; *S. C.*, 56 Maine, 559; *Blumenstiel on Bankruptcy*, 293; *Bump on Bankruptcy*, 594.

³ *Brown v. Gibbons*, 37 Iowa, 654, 657; *Reed v. Bullington*, 11 Nat. Bank. Reg. 408.

⁴ *McKay v. Funk*, 37 Iowa, 661, 663.

⁵ *Sturges v. Crowninshield*, 4 Wheat. 122, 196, 197; *McMillan v. McNeill*, 4 Wheat. 209; *Ogden v. Saunders*, 12

is subject to these exceptions: That in the absence of Federal legislation on the subject, States may pass insolvent laws which will discharge the debtor from the obligation of subsequently existing debts, where such debts were contracted within the State, and by persons resident in the same.¹ But where the contract or debt is one existing between citizens of different States, or the same was created in another State, no State insolvent law can discharge the obligation of the same, unless by the appearance and consent of the party to whom the obligation is owing.² The right of the State to pass such laws does not emanate as a grant of power from the Federal Constitution, but existed in the State governments prior to the adoption of that instrument by the States; but the Constitution limited its exercise by the provision therein that no State shall make any law impairing the obligation of contracts, and by giving to Congress power to provide a uniform law of bankruptcy.³ So that, under the Constitution, whatever the power of the States previously might have been in that respect, no insolvent or bankrupt law, nor any other law, may by them be made impairing the obligation of contracts; and though the States may pass bankrupt laws, under that name, or under that of insolvency, until Congress has exercised its powers on the subject by providing a uniform system, or even after the exercise thereof by Congress, yet such State laws may not go to the extent of impairing or acting upon contracts, and must not conflict with the acts of Congress on the subject. The power to make laws impairing contracts exists exclusively in Congress.⁴ Though this power vested in Congress to establish uniform laws on the subject of bankruptcy is not in express words made exclusive, yet it is in effect so in regard to the im-

Wheat 213; *Boyle v. Zacharie*, 6 Pet. 638; *Cooley on Const. Lim.* 4th Ed. 359.

¹ *Ogden v. Saunders*, 12 Wheat. 213; *Sturges v. Crowninshield*, 4 Wheat. 122; *Cook v. Moffat*, 5 How. 309; *Boyle v. Zacharie*, 6 Pet. 348; *Mather v. Bush*, 16 John. 233; *Gilman v. Lockwood*, 4 Wall. 409; *Pratt v. Chase*, 44 N. Y. 597.

² Cases cited above, and also *Springer v. Foster*, 2 Story, 387; *Wyman v. Mitchell*, 1 Cow. 316; *Woodhull v.*

Wagner, Baldwin, 300; *Suydam v. Broadnax*, 14 Pet. 75; *Donnelly v. Corbett*, 7 N. Y. 500; *Kelley v. Drury*, 9 Allen, 27; *Pratt v. Chase*, 44 N. Y. 597; *Baldwin v. Hale*, 1 Wall. 231; *McMillan v. McNeill*, 4 Wheat. 209; *Marsh v. Putnam*, 3 Gray, 551.

³ *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 199.

⁴ *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 194, 208; *McMillan v. McNeill*, 4 Wheat. 209; *Farmers' & Mechanics' Bank v. Smith*, 6 Wheat. 131.

pairing by such laws the obligations of contracts, for the latter, being inhibited to the States, is necessarily exclusively in Congress.¹ In the case of *Sturges v. Crowninshield*, above cited, the supreme court of the United States, MARSHALL, C. J., say: "This court is of the opinion that since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the Constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law."²

IV. STATE INSOLVENT LAWS. HOW AFFECTED BY NATIONAL BANKRUPT LAW.

As to the effect of a general national bankrupt law upon the insolvent laws of the several States, there has been a diversity of rulings, as well in the national as in the State courts. In Iowa and some others of the States, the State courts have held that assignments under a general State insolvent law for the general benefit of creditors, is valid as against an assignee of the same debtor in bankruptcy where the bankrupt proceedings were commenced after the making of the assignment.³ In others of the State courts the rulings have been the other way.⁴ So, in the national courts of original jurisdiction, there has been a like diversity of decisions. In some of the districts the State insolvent laws have been regarded as still in force, and proceedings under them have been respected when commenced anterior to the commencement of the proceedings in bankruptcy.⁵ In others it has been held that the taking effect of the general bankrupt law of the United States had the effect of suspending the force of the State insolvent laws during its continuance.⁶ With this diver-

¹ *Sturges v. Crowninshield*, 4 Wheat. 193, 194.

² 4 Wheat. 208.

³ *Reed v. Taylor*, 32 Iowa, 209; *In re Hawkins*, 2 Nat. Bank. Reg. 122; *Clark v. Bining*, 38 How. Pr. 341; *S. C.*, 39 *Ibid.* 363; *Ex parte Ziegenfuss*, 2 *Ired. L.* 463; *Cole v. Duncan*, 3 *Chicago Legal News*, 323.

⁴ *Meekin v. Creditors*, 19 *La. Ann.* 497; *S. C.*, 3 *Nat. Bank. Reg.* 126;

Day v. Bardwell, 97 *Mass.* 246; *Blanchard v. Russell*, 13 *Mass.* 1; *Griswold v. Pratt*, 9 *Met.* 16.

⁵ *Sedgwick v. Place*, 1 *Nat. Bank. Reg.* 204; *Sedgwick v. Menck*, *Ibid.* 108, 204; *In re Campbell*, *Ibid. Supplement*, 36; *In re Hawkins*, 2 *Ibid.* 122; *Langley v. Perry*, *Ibid.* 180.

⁶ *Ex parte Eames*, 2 *Story*, 322; *Thornhill v. The Bank of Louisiana*, 3 *Nat. Bank. Reg.* 110.

sity of rulings it was justly said by COLE, Justice, who delivered the opinion in the Iowa case of *Reed Bros. & Co. v. Taylor*,¹ the question could only be determined by the Supreme Court of the United States. At that time no decision of the question had been made by that court of last resort. In the case of *Mayer v. Hellman*,² decided by the Supreme Court of the United States in 1875, it was held that the Federal bankrupt law did not invalidate necessarily the State insolvent laws. But that both might exist at the same time. Nevertheless, if the assignment was made within six months previous to the institution of bankruptcy proceedings (three months if the proceedings are involuntary), then the assignment will not be sustained.³

¹ 32 Iowa, 209.

² 1 Otto, 496. See, further, Blum-

enstiel on Bankruptcy, 600; Bishop on Insolvent Debtors, § 233.

³ *Mayer v. Hellman*, 1 Otto, 496.

CHAPTER XXXII.

WRIT OF HABEAS CORPUS.

- I. FROM A STATE COURT.
- II. FROM A UNITED STATES COURT.
- III. THE RETURN OF THE WRIT.

I. FROM A STATE COURT.

The writ of *habeas corpus*, though a writ of liberty, cannot authorize a State court or State judge to discharge from custody a person held or imprisoned by an officer or court of the United States, under authority, or claim, and color of authority, of the national government.¹ If the petition or application for the writ shows that the detention or imprisonment is under the national authority, or by an officer thereof claiming to hold the party in virtue and under color of such authority, then the writ should be denied;² but if the petition merely allege illegal imprisonment or detention, without so showing the claim of authority by which the prisoner is detained, then the writ should issue, and if by the return of the officer or other custodian of the person held, or otherwise, it is made to appear that the prisoner is held under authority, or claim and color of authority of the United States, then the court or judge issuing the writ is to go no further, but should dismiss the writ, leaving the person detained where it found him, for the sole jurisdiction in such cases is in the courts of the United States; to those courts the party in custody can apply for relief, and their ruling, if not appealed from, is final; or if appealed from, then that of the Supreme Court of the

¹ Tarble's Case, 13 Wall. 397; *Ex parte Holman*, 28 Iowa, 88; *Duncan v. Darst*, 1 How. 301, 310; *McNutt v. Bland*, 2 How. 9; *Ex parte Anderson*, 16 Iowa, 595. See note to Hurd on Habeas Corpus, 2d Ed., 190, where the

many conflicting cases prior to Tarble's Case are referred to and discussed.

² Tarble's Case, 13 Wall. 397; *Ex parte Holman*, 28 Iowa, 88.

United States is final and binding everywhere upon both the Federal and State courts and authorities.¹

II. FROM A UNITED STATES COURT.

So a court of the United States cannot on *habeas corpus* interfere with a prisoner who is held under the process or order of a State court, except such interference be for temporary purposes of obtaining the evidence of such prisoner in some judicial proceeding, and that only upon writ of *habeas corpus ad testificandum*.² In the case here cited, *Ex parte Dorr*,³ the United States Supreme Court say: "Neither this nor any other court of the United States or judge thereof can issue a *habeas corpus* to bring up a prisoner who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process." Such prisoners are beyond the reach of a United States court even to answer an indictment therein.⁴

III. THE RETURN OF THE WRIT.

In such proceeding, in the first instance, before the court or judge issuing the writ, the return of the officer or person to whom it is directed should show and set forth the process, order or authority under which the prisoner is held, for the inspection of the court or judge, that it may be known if the prisoner is held in good faith, under authority, or claim and color of authority of the United States, and not under mere pretence of having that authority. The court or judge on finding such to be the case, can proceed no further, for his jurisdiction there ends. He cannot inquire into the merits of the question involved.⁵ In the language of the Supreme Court of the United States, TANEY, C. J., "they then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sov-

¹ *Ableman v. Booth*, and *United States v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397, 409; *Ex parte Holman*, 28 Iowa, 88; *Ex parte Anderson*, 16 Iowa, 595.

² *Ex parte Dorr*, 3 How. 103.

³ *Supra*.

⁴ *Ibid*.

⁵ *Tarble's Case*, 13 Wall. 379, 410; *Ex parte Holman*, 28 Iowa, 88.

ereignities. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him, and afford him redress.”¹ All that is meant by the necessity of its appearing that the prisoner is held under authority, or claim and color of authority of the United States is, that it appears that the prisoner is held by an officer of the United States under what, in truth, purports to be authority of the United States; if that appears, then the validity thereof is to be determined by the courts of the United States under the national constitution and laws.²

In the case of *Duncan v. Darst*, the prisoner was arrested and held by a marshal of the United States, in a civil cause in the United States court, by virtue of a *capias ad testificandum*, from which custody the State court assumed to discharge him in virtue of a State law in relation to insolvency, but the Supreme Court of the United States held that the State authorities had no such power.³

¹ Tarble's Case, 13 Wall. 410.

³ *Duncan v. Darst*, 1 How. 301.

² Tarble's Case, 13 Wall. 397, 411.

CHAPTER XXXIII.

RIGHT OF COMMON IN WASTE PLACES AND WATERS, AND RIGHT OF
EMINENT DOMAIN.

- I. IN THE TIDE WATERS AND WASTE PLACES.
- II. IN THE NAVIGABLE INLAND RIVERS AND LAND THEREUNDER.
- III. OWNERSHIP AND LOCAL JURISDICTION OF BOUNDARY WATERS.
- IV. RIGHT OF EMINENT DOMAIN.

I. IN THE TIDE WATERS AND WASTE PLACES.

Is in the People of the State. The right of common in the tide waters, rivers, and waste places of the several States appropriated to the use of their respective citizens is a property right, the ownership of which is in the people of each State, in their aggregate sovereignty.¹ It is a right not of citizenship alone, but of citizenship and property combined.²

Limitation of Use Thereof. Each State may, subject, however, to freedom of commerce and to the power of Congress over the same, control and limit the use of the same at will, and may restrict the use thereof to its own citizens; for this common property in a State, or the use thereof, is not vested in citizens of other States by force of that clause of the United States Constitution which declares that the citizens of each State are "entitled to all the privileges and immunities of citizens of the several States."³

II IN NAVIGABLE INLAND WATERS AND LAND THEREUNDER.

Belong to the States. The shores of and ground under the navigable waters belong to the States; not by grant from the general government, but because they never were parted with.⁴

¹ *Martin v. Waddell*, 16 Pet. 367, 410; *State v. Medbury*, 3 R. I. 138.

² *McCready v. Virginia*, 4 Otto, 391, 395.

³ *McCready v. Virginia*, 4 Otto, 391, 395; *State v. Medbury*, 3 R. I. 138.

⁴ *Pollard v. Hagan*, 3 How. 212; *People v. Tibbetts*, 19 N. Y. 523;

And upon terms of admission the same rights in that respect exists in the new States.¹

But this ownership, or right of the several States, is subject to the paramount right of the national government in reference to the regulation of commerce.²

III. OWNERSHIP AND LOCAL JURISDICTION OF INTER-STATE BOUNDARY WATERS.

In the absence of other express grant or arrangement, when two States have coterminous boundaries on such water, each takes jurisdiction to the center thereof, except as to the admiralty jurisdiction, and counties of such States expressed to be bounded by such waters will be held to extend to such coterminous State boundaries, in the center of the river or water, although in the law creating them they be said to extend to low water mark. By intendment of law they are limited only by the center of the water or stream.³

Right of Fishery. And each State and its citizens has the exclusive right of fishery in its own internal waters, and may prevent the taking thereof by citizens of other States.⁴

IV. RIGHT OF EMINENT DOMAIN.

The right of *eminent domain*, not only on land but also over the soil under the navigable waters, *for all municipal purposes, belongs exclusively to the States* within their respective territorial jurisdictions, where not ceded to the United States; but it is a municipal authority, and one which may not be so used as to affect the exercise of any right of commerce or national domain of the national government, under the constitution of the United States and laws made in pursuance thereof;⁵ and except as regards the public lands belonging to the United States.

Mumford v. Wardwell, 6 Wall. 423;
Mahler v. Norwich & New York
Trans. Co., 35 N. Y. 352; Martin v.
Waddell, 16 Pet. 367, 410; Corfield v.
Coryell, 4 Wash. C. C. 371, 385, 386;
People v. New York & Staten Island
Ferry Co., 68 N. Y. 71.

¹ Pollard v. Hagan, 3 How. 212.

² People v. Tibbetts, 19 N. Y. 523;
Mahler v. Norwich & New York

Trans. Co., 35 N. Y. 352; Martin v.
Waddell, 16 Pet. 367, 410; Corfield v.
Coryell, 4 Wash. C. C. 371, 385, 386;
People v. New York & Staten Island
Ferry Co., 68 N. Y. 71.

³ Mahler v. Norwich & New York
Trans. Co., 35 N. Y. 352; Corfield v.
Coryell, 4 Wash. C. C. 386.

⁴ State v. Medbury, 3 R. I. 133.

⁵ Pollard v. Hagan, 3 How. 230.

CHAPTER XXXIV.

JURISDICTION OVER STATE BOUNDARY RIVERS.

- I. ADMIRALTY JURISDICTION OF UNITED STATES.
- II. THE TERRITORIAL STATE BOUNDARY AS TO THINGS PERMANENT.
- III. CONCURRENT STATE JURISDICTION AND ITS EXERCISE OVER THE WHOLE RIVER EXCEPT AS TO THINGS PERMANENT.

I. ADMIRALTY JURISDICTION OF UNITED STATES.

Jurisdiction Over Boundary Rivers. When by the fundamental laws, or constitutions, or terms of their admission into the Union as States, certain of our States have navigable rivers for coterminous boundaries, with concurrent jurisdiction in each over the waters of such rivers, as to matters of rightful State jurisdiction, yet the United States at the same time have admiralty and maritime jurisdiction over every part of such navigable waters from shore to shore, in maritime and admiralty cases. This jurisdiction of the national government and courts extends to all matters and things of a maritime character, and to the regulation of commerce thereon and intercourse of a commercial nature between States bordering on, or reached by means in part of such navigable waters or river.¹

II. THE TERRITORIAL STATE BOUNDARY AS TO THINGS PERMANENT.

Islands and Other Local Objects. When by the constitutions and laws of two adjoining States they have for boundary between them the main channel of a navigable river, and also have concurrent jurisdiction over the whole river in its entire width from shore to shore; yet, notwithstanding such concurrent jurisdiction, neither of them, or their courts, has jurisdiction or cognizance of objects of a fixed and permanent nature situated at the

¹ *Genesee Chief v. Fitzhugh*, 12 How. 443. See *ante*, Chap. XXVIII, where the general subject of admiralty is discussed.

opposite shore, or beyond such main channel, and within the territorial boundary of the other State.¹

Territorial Boundary. The actual territorial boundary of each is the main channel of the river; and this is the limit of jurisdiction over permanent objects, natural or artificial.²

Jurisdiction of Permanent Objects. But in the very nature of things, jurisdiction of permanent objects is exclusive in the State on whose side of the main channel they are situated. Concurrent jurisdiction of the abutting States over permanent objects, as islands situated in the river, or permanent erections at either shore, would be utterly impracticable in the administrative affairs of State, as rendering owners and residents of such property liable to taxation, and other liabilities and duties of citizenship and ownership, to each of the States. Hence, it can never be intended in law that jurisdiction which is concurrent over a river is concurrent also over islands and other permanently fixed objects therein. Nor does the reason of the law of concurrent jurisdiction apply to such objects whose true location in reference to the center of the main channel can always be known or ascertained; but it was to obviate the difficulty of showing on which side thereof occurrences of judicial cognizance had taken place that concurrent jurisdiction was resorted to in law.

III. CONCURRENT STATE JURISDICTION AND ITS EXERCISE OVER THE WHOLE RIVER, EXCEPT AS TO THINGS PERMANENT.

The existence of concurrent jurisdiction in two States over a river that is a common boundary between them, as more particularly referred to in Section I. of this Chapter, vests in each of such States, and in the courts thereof, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and courts, jurisdiction both civil and criminal, from shore to shore, of all matters of rightful State cognizance occurring upon such river in all parts thereof where it forms such common boundary.³ Such concurrent juris-

¹ *Gilbert v. Moline Water Power and Manuf'g Co.*, 19 Iowa, 319; *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485.

² *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485; *Gilbert v. Moline Water*

Power and Manuf'g Co., 19 Iowa 319, 323.

³ *Gilbert v. Moline Water Power and Manuf'g Co.*, 19 Iowa, 319; *State v. Mullen*, 35 Iowa, 199; *State v. Cameron*, 2 Pinn. 490. For a somewhat

diction obviates the difficulty in judicial proceedings of ascertaining on which side of the main channel of a boundary river occurrences have transpired, or crimes have been committed.¹

The Jurisdiction First Attaching Holds the Case. Of the matters thus subject to the concurrent jurisdiction of two States the court which gets *actual* jurisdiction of the cause, or subject of legal adjudication, prosecution or trial, is entitled to hold the same to a final determination thereof, and neither party thereto can be forced into a different jurisdiction upon the same subject matter of litigation, unless the case be removable to the United States court.² Moreover, the full and final adjudication thereof upon the merits by such court of concurrent jurisdiction *directly made*, is conclusive, and a bar in all other courts wherein the same subject matter, between the same parties, comes judicially in question.³

Inequality and Effect of the System. This system of concurrent jurisdiction of the adjoining States, over a river, as common boundary between them, though a wise and almost necessary provision, is, nevertheless, in some respects, unequal and wanting in uniformity in its operation and effect.

First, in a criminal point of view. Each State, in carrying out its own concurrent jurisdiction, must do so in the enforcement of its own laws. It cannot enforce those of the other State. This must be the result, not only as to the practical administration thereof in its courts, but also as to the measure of culpability or criminality and punishment. Upon general principles, not even an arrest may be made except for the alleged violation of law, and that law must needs be the law of the State whose tribunals and officers make the arrest, except in cases for extradition. Thus, in the course of things, it must happen that the offense charged occurred beyond the main channel of the river. Technically, this is in the territorial limits of the opposite State, and yet arrest and punishment is made and enforced under the laws of a different State

kindred case, see *Mahler v. Norwich & New York Trans. Co.*, 35 N. Y. 352.

¹ *Gilbert v. Moline Water Power and Manuf'g Co.*, 19 Iowa, 319, 322.

² *Taylor v. Carryl*, 20 How. 583; *Shelby v. Bacon*, 10 How. 56; *Smith v. McIver*, 9 Wheat. 532; *Ex parte*

Robinson, 6 McL. 355; *The Robert Fulton*, 1 Paine, 621; *Mallett v. Dexter*, 1 Curtis, 178; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334.

³ *Herman's Law of Estoppel*, p. 36, § 41.

than that in whose actual territorial limits the crime was committed.

Again: The punishment for the offense may not be, and seldom is, in both States alike, nor the limitation of time in which it may be prosecuted. Yet the State whose tribunals first get *actual* jurisdiction of the case, by arrest, will complete the trial, and if conviction follows, will inflict the punishment. Thus the penalty or punishment for offenses committed on rivers, the jurisdictional features of which bring them within the jurisdiction of State courts, as contradistinguished from that of the Federal courts, over highways of commerce, may be greater or less, as the culprit may chance to first come under the actual jurisdiction of one or the other of such adjoining States.

Secondly, a like disparity of liability may occur in regard to acts of commission or omission, upon such common water, which are by statutes of one or both such States made actionable. Take, for instance, the statutory liability to an action at law for damages, for acts of negligence or wrong resulting in the death of a person. In one State, as in Illinois, the recovery may be limited to a certain sum, beyond which a jury cannot go, in finding a verdict. In the other, as in Iowa, the finding as to the amount is left discretionary in the jury, under the evidence, subject only to the restraining power of the court, in granting a new trial if the amount found be *excessive* under the evidence and the rules of law. Again, in one of the States the common law may prevail, as it does in Illinois, in regard to the liability of a principal for acts of negligence of a servant causing an injury to a co-servant of the same common employer, while in the other State, a statutory provision, as really is the case in Iowa, gives the action, as a general principle, irrespective of the relation of servant and co-servant. Yet, under all these circumstances, and diversities of the law, the State first obtaining *actual* jurisdiction of the *particular case* will carry its own laws into effect therein, irrespective of whether the occurrence transpired on the one side or the other of the main channel of the river, which main channel is the *actual* territorial boundary line, marking the *territorial extent* and territorial jurisdiction of each of such States.

In still another view of this incongruity of the law, suppose an offense to be committed by the common act of several persons, involving equal culpability. It is a well known rule of

law that such persons may be tried separately; now one of them falls into the hands of justice in one of those States, and another one of them, at the same time, into those of the opposite State; they are both tried and convicted. By the law of one State, the convict is punishable by imprisonment; in the other State, the same offense is punishable with death, and the convict there is executed. Yet these, and other like incongruities, are perhaps unavoidable, as the laws of each State should everywhere have a uniform operation in its own courts, in reference to offenses, whether committed on the land or on the water. Nor is the difficulty obviated by each State undertaking to administer and enforce the law of the other, in regard to occurrences taking place, or crimes committed, on the other's side of the main channel of the river; for, in the first place, a State cannot administer or enforce the criminal or penal laws of another State;¹ and, secondly, if it could, then the very difficulty is revived which the concurrent jurisdiction is intended to obviate: that is, the necessity of ascertaining, in each case, on which side of the main channel the trouble occurred, so as to bring the case within the jurisdiction of the laws of such other State. Thus, the reason of the law of concurrent jurisdiction would cease to exist; and it is a well known and salutary rule of law that when the reason of the law ceases, the law itself ceases to exist, and therefore such inter-State jurisdiction would cease. But, by reference to the origin thereof, it will be seen that this concurrent jurisdiction is given, over the *river*, and not *of the laws* of the abutting States. Each State is left to administer its own laws.²

But, to prosecute this subject still further: Suppose the laws of one of the abutting States prohibit and punish that which by the laws of the other is tolerated — take for instance the sale of intoxicating liquors, or the keeping of disreputable places of resort, and persons engage in such business in boats moving along up or down on the river, at the probable main channel, or at or along, or near to, either of the shores, as convenience or caprice may suggest. Or, suppose that while prohibited by the

¹ The Antelope, 10 Wheat. 66; *Scoville v. Canfield*, 14 John. 338; *Pickering v. Fisk*, 6 Vt. 102; *State v. Knight*, Taylor Law and Eq. (N. C.) 65.

² 3 U. S. Stat. at Large, 423, Chap. LXVII.; 5 Stat. at Large, 742; Iowa Laws, *Revision* of 1860, Chap. I. § 3, and Code of Iowa, 1873, Chap. I. § 3.

laws of one of these States, these things are *licensed* by or under the laws of the other. What, then, is the jurisdiction, and to what extent to be enforced? Evidently the jurisdiction must fail, or else each State must enforce its own laws. In the case here cited, of *State v. Mullen*, the defendant was indicted, convicted and punished for a nuisance, in the courts of Iowa, under the laws of that State, and the nuisance was abated, which consisted in the keeping of a house of ill-fame on a boat on the Mississippi, movable from place to place, but temporarily resting at an island therein, on the Illinois side of the main channel of the river, where it was landed for repairs, and was left temporarily aground by the receding of the waters, but in a condition to float again on the rising of the river. It appearing that the boat was kept as a movable resort, upon the river, between the shore of Illinois and the shore of the county in Iowa wherein the indictment was found, and that its location as thus landed was within these limits, the Supreme Court of Iowa held the jurisdiction and conviction to be rightful. DAY, J., who delivered the opinion of the court, says: "The boat was constructed, not for the purpose of being permanently attached to the soil, but of floating upon the surface of the river. It was afloat or aground, as the waters rose or receded. When it settled down upon the soil, in consequence of the recession of the water, it did not become real estate. It rested upon no foundations. It had no fixed location. With every rise of the river it floated. Hence, it was *on the river* in a sense very different from the dam considered in the" cases of *Railroad Co. v. Ward*,¹ and *Gilbert v. The Moline Water Power and Manufacturing Company*,² "And, if on the river, it became subject to the jurisdiction of this State concurrently with that of the State of Illinois, and the judgment of the court was right."

So it doubtless was. But suppose the State of Illinois had, by law, licensed this very concern and its purposes, to be so used upon the river, as did the authorities of a neighboring State license, at one time, such places of resort on the land. *Query* then? What would have been the result thereof upon the prosecution in the Iowa case above referred to? Would such a defense have been valid? And, if so, would such validity cover the

¹ 2 Black, 485.

² 19 Iowa, 319.

whole river, from shore to shore, or only that part which is on the Illinois side of the main channel? If the former: that is, if valid from shore to shore, then *concurrent* jurisdiction on that subject no longer exists, and the jurisdiction of Illinois is, in that respect, *exclusive*, unless each administers its own laws irrespective of the other or of its laws. If the latter: that is, if valid only on that part of the river which is on the Illinois side of the main channel, then the very difficulty arises, again, which it was the purpose of *concurrent* jurisdiction to obviate, to-wit: the difficulty, in judicial trials, of ascertaining the juxtaposition of the *locus in quo* to that of the main channel of the river. So questions may arise out of legislation of an economical character, the violation of which itself involves, in no degree, any moral turpitude. As, for instance, the prohibition of the taking of fish with nets or seines, in such a river, or at certain seasons of the year, enacted by one of such States, while the other declares by law the right of *free fishery* therein. But, these remarks being merely speculative, it is not our purpose to extend them further, nor are we, in the absence of any decisions in that respect, authorized to lay down any rule, or express any opinion, on the subject. It is nevertheless true, however, that all these and many other legal questions are liable to arise out of such *concurrent* jurisdiction, but we do not think that that establishes a good reason why it should not exist.

So, in regard to contracts, which in many cases depend on the place of the contract for their force and validity and meaning. Contracts may be legal and binding if made in one of those States which, if made in the other one, would be illegal and void, and the contract would be enforced or not just as the question of enforcement chanced to come before the tribunals of one or the other of the States thus having concurrent jurisdiction over the place where it was made; for jurisdiction is matter of law, as well as of practical administration thereof. In the case last supposed, the validity of the contract must be tested by the laws of one or the other of those States, if it be not fixed by the evidence on which side of the line the bargain was made, and it therefore follows most reasonably that each State would enforce its own.

In the case of *The State v. Mullen*, the Supreme Court of Iowa hold, that jurisdiction over offenses committed on the Mississippi anywhere either on the one or the other side of the main

channel thereof, in front of any county of the State which abuts upon said river, attaches in the courts of said county of proper jurisdiction otherwise to try the same (unless such jurisdiction is *exclusive*, in courts of the United States).¹ A like concurrent jurisdiction of Wisconsin and Minnesota exists on the Mississippi river, where it is a boundary between these two States.² The Supreme Court of Wisconsin, in a trial of a charge of murder, hold on error a similar principle to that of the Iowa courts in *The State v. Mullen*; that is, that jurisdiction of offenses committed on the said river in front of any county, is vested in the courts of such county competent to try such offenses if committed in its borders on the land, and this, too, regardless as to whether the act be committed on the one side or other of the main channel of the river.³

As a tangible boundary of a Territorial character between Kentucky and Indiana, low water mark on the Indiana side of the Ohio river is the true line; but said States of Kentucky and Indiana possess concurrent jurisdiction, civil and criminal, over the whole river where said States possess the opposite shores.⁴ State laws giving a right of action for wrongful acts causing the death of a person, may be enforced in personal actions of a common law nature, within such concurrent jurisdictions, without infringing upon the right of Congress to regulate commerce, or on the maritime jurisdiction of the United States.⁵ Where such concurrent jurisdiction exists, judgment in one State is a bar to an action for the same cause in the other State, and if judgment should be rendered in both States, yet satisfaction of one is satisfaction of the other. There can be but one satisfaction.⁶ The *river* being entirely within the *boundary* of Kentucky, does not affect the concurrent jurisdiction of the two States thereon, in the face of the express grant thereof.⁷ It is no defense to such an action that a sum of money is received on a life insurance of the deceased, where suit is for injury causing death.⁸ Such a

¹ *State v. Mullen*, 35 Iowa, 199, 203.

² *State v. Cameron*, 2 Pinn. 490.

³ *Ibid.*, p. 495.

⁴ *Sherlock v. Alling*, 44 Ind. 184, 194; *Handly v. Anthony*, 5 Wheat. 374; *McFall v. The Commonwealth*, 2 Met. (Ky.) 394; *Carlisle v. The State*, 32 Ind. 55.

⁵ *Sherlock v. Alling*, 44 Ind. 194.

⁶ *Sherlock v. Alling*, 44 Ind. 184, 197; *S. C.*, 3 Otto, 399.

⁷ *Ibid.*

⁸ *Railroad Co. v. Barron*, 5 Wall. 90, 105; *Althorf v. Wolfe*, 22 N. Y. 355.

defense would subrogate the wrongdoer to the benefit of the insurance to enable him to more easily pay for the result of his own wrong.

The Indiana statute declares that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

Under this statute, the Supreme Court of Indiana hold, that an action lies for a wrongful act causing death, occurring on the Ohio river, under the concurrent jurisdiction of Indiana and Kentucky, when occurring between opposite shores of said States, and that the fact that the statute of Kentucky on the same subject might be different from that of Indiana, would not militate against such concurrent jurisdiction.¹

An interesting inter-State case is the case of *Stillman v. White Rock Manuf. Co.*,² growing out of milling interests on the Pawcatuck river. This river is the boundary line between Connecticut and Rhode Island. The actual boundary being the center of the river.³ The mills of the parties were situated on opposite sides of the river near to each other, and were both supplied with water power from the same stream. The one party, by means of a canal, diverted a larger portion than their undivided share of the water, and an injunction was granted to restrain the unjust interference. As neither party held land on the opposite side of the river opposite his own establishment, no action would lie for the interference with the *realty* in cutting the canal on the other party's own land.⁴ Yet such diversion of the water was the cause of injury to the other party calling for a remedy, whether regarded as done to the soil or freehold, or to some sort of corporal easement of the injured party, in his right

¹ *Sherlock v. Alling*, 44 Ind. 184; *S. C.*, 3 Otto, 399.

² 3 Wood. & M. 538, 541.

³ *Ibid.*

⁴ *Stillman v. White Rock Manf. Co.*, 3 Wood. & M. 538, 542; *Tyler v. Wilkinson*, 4 Mas. 397.

to the natural flow of the water.¹ The two localities were not only governed by laws of different States, but were situated in different circuits of courts of the United States administering these laws. The court (WOODBURY, Justice,) held, the interest of the parties, to be a corporeal easement or right to an undivided half of the water of the whole stream, or tenancy in common therein, and that if either party took or diverted more than the half, such use or diversion thereof would be an injury, entitled in law to redress by some sort of proceeding.² In such cases the injury is regarded as committed in waters possessed beyond the center of the stream;³ as such interest may exist in water and in its use.⁴ The first and direct injury, say the court, in this case, is to the easement and consequent rights of the injured party existing beyond the center of the stream. The next, and which is a consequential injury, is to the mills and lands adjoining the stream, before reaching the center; for this, too, a remedy is due, just as a right of way on land in one State, to property in another, is an interest situated in the State where such right of way is, and the injury thereto may therein be prosecuted. If a remedy be pursued in the United States court, it must be in that State wherein the injury is committed (where the canal is dug) and the owner resides, as an injunction in the other State could not be executed, and as so far as the cause of the injury is concerned, the proceeding is partly *in rem*, and must be there abated if at all.⁵ Relief was granted by issuing an injunction.

Where the center of a river is the boundary line between two States, permanent erections of value therein in either State, on either side of such line, are taxable in the State wherein they are erected. Thus, where the center of the Delaware river is the boundary line between the States of Pennsylvania and New Jersey, the piers and permanent bridge-work of a bridge across the river was held taxable; thus so much of this abutment and bridge as was on the New Jersey side of said boundary was taxable in New Jersey as real estate, irrespective of the capital stock.⁶

¹ Stillman v. White Rock Manf. Co.,
3 Wood. & M. 533, 542; Cook v. Hull,
3 Pick. 270.

² Stillman v. White Rock Manf. Co.,
3 Wood. & M. 533, 543; Angell on
Watercourses, Secs. 5-9.

³ Stillman v. White Rock Manf. Co.,
3 Wood. & M. 533, 544.

⁴ Bullen v. Runnels, 2 N. H. 255, 259.

⁵ Stillman v. White Rock Manf. Co.,
3 Wood. & M. 546.

⁶ State v. Metz, 5 Dutch. 122.

The boundary of the State of New York, as between New York and New Jersey, is at the low water mark, at the New Jersey shore of the Hudson river. The jurisdiction of New York extends to said boundary and is plenary both in civil and criminal matters.¹ This jurisdiction enabled the courts of New York, for preservation and protection of the harbor and river, in the bay of New York, to restrain persons, by injunction, from filling in and forming land in the said river and harbor, at the New Jersey shore.²

Contracts of affreightment or carriage to be performed by a corporate common carrier, partly in crossing a common boundary river of two States, but mainly to be performed within the State wherein the carrier is incorporated, are to be construed as to the obligation of performance by the laws of the latter State.³ In the case here cited⁴ the contract was made at the wharf on the Pennsylvania side of the Delaware river, for transportation of baggage over the defendant's railroad, from thence across the Delaware and through New Jersey to Atlantic City. The supreme court of Pennsylvania, SHARSWOOD, J., say: "As the contract relied on in this case, as the ground of the liability of the defendants, was to be performed in the State of New Jersey, we must look to the law of that State to determine the extent of that liability. It is no answer to say that part of the undertaking was to carry the plaintiff and his baggage across the Delaware to Camden, and so in part within the limits of Pennsylvania. That river is conterminous between Pennsylvania and New Jersey, and the inhabitants of both have equal rights of navigation and passage. * * * It was by virtue of their franchise as a corporation, derived from the State of New Jersey, that the defendants made the contract. Nor would it make any difference if it appeared that the trunk was stolen or lost at the wharf in Philadelphia, of which there is no evidence."⁵

¹ *People v. Central R. R. of New Jersey*, 48 Barb. 478.

² *Ibid.*

³ *Brown v. Camden & Atlantic R. R.*

Co., 83 Penn. St. 316; *S. C.*, 15 Am. Ry. Repts. 421.

⁴ *Ibid.*

⁵ 83 Penn. St. 316; *S. C.*, 15 Am. Ry. Repts. 421, 424.

CHAPTER XXXV.

POWER OF THE STATES TO LICENSE INTER-STATE FERRIES.

- I. THE POWER TO LICENSE IS A POLICE POWER.
- II. THE EXTENT THEREOF AND EFFECT OF ITS EXERCISE.

I. POWER TO LICENSE IS A POLICE POWER.

Nice questions arise in regard to the grant of ferry privileges across rivers and other waters which are a common boundary between two States.

First. As to how far this species of intercourse comes within the jurisdiction of Congress and the Federal courts.

The Power is in the State. It is well settled that the granting of a franchise or license to keep a ferry, whether across waters wholly within a State or across waters which are a boundary between two States, is of the police powers of the States which has never been parted with or surrendered to the National government, but has always been exercised by the several States; and that the exercise thereof, in reference to mere matter of *ferryage* from shore to shore, does not come within or infringe upon the constitutional grant to Congress of power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes," nor does it infringe the provisions of the ordinance of 1787 in regard to the free navigation of the Mississippi river and its navigable waters. The authority of the several States over this subject is but part and parcel of that municipal and police power of the several States of making inspection laws, health laws and quarantine regulations, and laws for the regulations of local matters and of commerce wholly internal of the State; "all of which," in the language of Chief Justice MARSHALL, in *Gibbons v. Ogden*, "can be most advantageously exercised by the States themselves."¹

¹ 9 Wheat. 1; *Conway v. Taylor*, 1 Black, 603, 633, 635; *Fanning v. Gre-* goire, 16 How. 524; *Chilvers v. The People*, 11 Mich. 43; *Chiapella v.*

But its Exercise may not Interfere with Commerce. Should a State, in the exercise of any of these powers, encroach upon the commercial powers of the national government, it would become the duty of the United States supreme court to control or annul such encroachment.¹ But the possibility of abuse in its exercise is no argument against the existence of that power, which being first openly asserted in *Gibbons v. Ogden, supra*, has not, as was said by Justice SWAYNE in *Conway v. Taylor's Executors*, since been questioned in any adjudicated case, but is repeatedly affirmed by both State and United States courts.² It being thus settled, not only by the highest national court but by a general concurrence of opinion of the State courts, that this power of ferries and ferry franchises is one of a local and police nature appertaining to the several States within their own proper jurisdictional limits, the extent of its legitimate exercise becomes now the next subject of inquiry.

II. THE EXTENT THEREOF AND EFFECT OF ITS EXERCISE.

When the stream, the shores thereof, and the locality upon which this power of the States is brought to bear are situated wholly within the territorial limits of a State, then there can be no question as to the power in the State to grant such franchises and regulate the same by law. But when the water to be ferried over is the boundary line between two States, by reason whereof the opposite shores thereof are within the territorial jurisdiction of different States, then, although the power still exists in each of said States, yet the question arises as to the extent of that power, and in what manner it may be exercised. This we will now consider.

Laws have no Extra-Territorial Force. It is well settled that the laws of a State have no extra-territorial force, and it therefore results therefrom that grant of a franchise by a State law, or in virtue of a State law, cannot of its own mere force confer extra-territorial privileges, or extend the legal existence of such franchise into the limits of another State or territorial jurisdiction.³

Brown, 14 La. Ann. 189; Marshall v. Grimes, 41 Miss. 27; Columbia D. B. Co. v. Geisse, 38 N. J. Law, 39.

¹ Pennsylvania v. The Wheeling

Bridge Co., 13 How. 519; Conway v. Taylor, 1 Black, 603, 634.

² Conway v. Taylor, 1 Black, 603, 634.

³ Weld v. Chapman, 2 Iowa, 524; Blanchard v. Russell, 13 Mass. 1.

The Grant is Local. It follows, from these principles, that a grant of a ferry franchise by a State over a river which is a common boundary between such State and another State confers only the right to transport persons and things from the shore of the State making the grant to the shore and landing of such other State; but it need not confer the right to there land, for that right exists without, as to all public landings;¹ and not the right to there take persons and passengers aboard and transport them back across such water course.²

It is a Right to Carry, and not to Land. The Latter Exists without the Grant. "A ferry is in respect to the landing place, and not of the water. The water may be to one, and the ferry to another."³ The franchise is local. "An estate in such a franchise, and an estate in land rest upon the same principle."⁴ Being thus local, if the right conferred be in reference to a water which is a boundary between two States, then the only right that passes is to take passengers or property from the shore in the State where the grant is made. The grant is from that shore or landing place, and not to the landing in the opposite State. And so if a ferry franchise be granted in the opposite State, it is a grant *from* the shore or landing in such State, and not a grant of the right also of landing in the other State.⁵ The right of landing in public places appertains to all water crafts, independent of special authority or privileges.⁶

The enrollment or licensing of a boat under the United States laws, for the coasting trade, does not alter the case, as above stated, in regard to a right to ferry. It confers no such right.⁷ As we have seen, a ferry license or franchise has reference to the land of the river shore in the State where the license is obtained, and to the *particular* place of the shore designated in the grant.

¹ Conway v. Taylor, 1 Black, 603, 632, 634.

² Conway v. Taylor, 1 Black, 603; Weld v. Chapman, 2 Iowa, 524; Ross v. Page, 6 Ham. (Ohio,) 166; Somerville v. Wimbish, 7 Gratt. 205, 230; Memphis v. Overton, 3 Yerg. 387.

³ 13 Viner's Ab. 208a; Conway v. Taylor, 1 Black, 603, 630; People v. Babcock, 11 Wend. 587; Fanning v. Gregoire, 16 How. 524; Freeholders

of Hudson Co. v. State, 4 Zab. 718; Phillips v. Bloomington, 1 G. Greene, 498; Memphis v. Overton, 3 Yerg. 390; Bowman v. Wathen, 2 McL. 377.

⁴ 3 Kent, *459; Conway v. Taylor, 1 Black, 603, 632.

⁵ Conway v. Taylor, 1 Black, 603, 631.

⁶ Ibid.

⁷ Ibid.

It neither confers nor restricts any right of passing over the water. It is not a grant of the water, or of the use thereof; and though restricted to a particular locality of the river shore, there is no restriction as to how far up or down the stream the craft may go, or as to the route to be pursued, after leaving the landing place of the grant, or in approaching the same; nor does the validity of the franchise depend on the privilege of landing at the shore in the opposite State. It is a complete right when granted by the authorities of one State, and has reference merely to the right of taking and landing at the point of land therein designated in the license.¹ Hence it is, that in law the owner of the soil of the landing place is deemed to have the preference for such a grant. It is so, because, as hereinbefore stated, "a ferry is in respect of the landing place; and not of the water."² To create such a franchise, the concurrent action of the two States is not necessary, but each may make such *from* its own shore, a violation of which is restrainable by injunction.³

So, in New York, the courts there hold that power exists in that State to establish and license ferries, by law, across the Niagara river, from the shore in that State, and that to run a ferry there without a license is a violation of the statute law of New York in relation to ferries. It is held to be none the less so, that the State authority and jurisdiction extends only to the middle of the river. The power conferred is to ferry from the American shore. As to the right of landing on the Canada side, the State of New York has nothing to do with that.⁴ It was objected that such exercise of authority by the State conflicted with the authority of Congress to regulate commerce with foreign States; but the court held that it was a domestic right in the State, always conceded by the national to the State governments.⁵

The Power is a Municipal One. The grant of ferry franchises, as a means of intercommunication over streams between States, is not vested in the United States by the Constitution, but is municipal in its character, and is under State control, both as to

¹ Conway v. Taylor, 1 Black, 603; Columbia Dela. Bridge Co. v. Geisse, 38 N. J. 39; Newport v. Taylor, 16 B. Mon. 699.

² Conway v. Taylor, 1 Black, 603, 629, 630.

³ Ibid.

⁴ People v. Babcock, 11 Wend. 587.

⁵ Ibid.

the making of the grant and the regulation of its exercise;¹ and although the right granted may not authorize the party to land in another State, or to take passengers therefrom, yet it is a grant within the jurisdiction of the State making it, and extends to the limits of such jurisdiction. Beyond that the power of the State making the grant cannot go.²

Navigable Waters and Public Landings are Free. But irrespective of the grant of the franchise, the navigable inter-State waters are free for the purposes of intercourse and navigation; and so, also, are the public places of landing, a species of easement free to all citizens of the several States.³ They are thus free, not only on general principles, but are more especially so under the Constitution of the United States, which secures to the citizens of the States all the privileges and immunities of citizens of each State.⁴

The exercise of a ferry privilege across a boundary river between two nations or States that are at war is a contraband act, and for the suppression thereof by military force no civil action can be maintained.⁵ The municipal regulations of a State for establishing ferries and bridges over waters forming county boundaries do not apply to streams which are boundaries between nations or States.⁶ Subsequent to the occurrence for which the action above referred to was brought, an act of the Texas legislature had been passed in reference to bridges and ferries across international streams. This latter act of legislation provides for a system of reciprocity in respect to such streams; but the State cannot give a valid privilege or franchise beyond its boundaries, and these boundaries are the middle of the stream, if not otherwise stipulated, in cases where a river or water is the boundary between two nations or States, as is the Rio Grande, between the United States and Mexico; and, as a consequence, between the State of Texas and Mexico, along the same river, so far as bordered on by the State of Texas.⁷

¹ *State v. Freeholders of Hudson Co.*, 3 Zab. 206, 213; *Memphis v. Overton*, 3 Yerg. 387.

² *State v. Freeholders of Hudson Co.*, 3 Zab. 203.

³ *Memphis v. Overton*, 3 Yerg. 387.

⁴ *Ibid.*

⁵ *Ogden v. Lund*, 11 Tex. 688, 691.

⁶ *Ibid.*

⁷ *Ibid.*

CHAPTER XXXVI.

REMOVALS TO UNITED STATES COURT.

- I. WHEN THE PROCEEDING IS HAD FOR ACTS DONE UNDER AUTHORITY OF THE UNITED STATES.
- II. REMOVALS UNDER THE ACT OF CONGRESS OF MARCH 3D, 1875.
- III. THE RIGHT OF REMOVAL CANNOT BE LIMITED OR BARGAINED AWAY.
- IV. CITIZENSHIP CAN ONLY BE DISPUTED BY PLEA IN ABATEMENT.
- V. CITIZENSHIP, HOW STATED BY CORPORATION PLAINTIFF.
- VI. UNITED STATES COURT IS THE JUDGE OF THE CAUSE FOR REMOVAL.
- VII. WHEN STATE COURT REFUSES TO ALLOW REMOVAL.
- VIII. REMOVAL OF NATIONAL CORPORATION.

I. WHEN THE PROCEEDING IS HAD FOR ACTS DONE UNDER
AUTHORITY OF UNITED STATES.

When an action, suit or other proceeding is commenced in a State court against an officer of the United States, or other person, for or on account of an act done under the United States revenue laws, or under color thereof, or on account of title, right or authority set up by such officer or person, the defendant may, any time before trial, on petition to the United States circuit court for the district, setting forth the particulars thereof, verified by affidavit, and accompanied by a certificate of an attorney or counselor at law of the district, showing that he has examined into the particulars of the case and believes the petition to be true, may have the cause docketed in said circuit court of the United States, and have a writ of *certiorari* issued by the court, if in term, and by the clerk if in vacation, directed to such State court, requiring such State court to send to such circuit court of the United States the proceedings in the cause and to stay further proceedings in the State court, and on delivery of the writ to the State court the suit or proceeding is deemed removed, and all further proceeding in the cause in the State court is null and void.¹

¹ 1 Brightly's Dig. of Laws, 128, 129; State v. Circuit Judge, 33 Wis. 127; 4 U. S. Stat. at Large, 633; R. S.

of U. S. 1874, § 643. See, further, Dennistoun v. Draper, 5 Blatch. 336; Wood v. Mathews, 2 Blatch, 370.

II. REMOVALS UNDER THE ACT OF CONGRESS OF MARCH 3, 1875.

In a suit of a civil nature in law or equity brought in any State court, involving a matter in dispute which, exclusive of costs, exceeds the sum or value of five hundred dollars, and arising under the constitution, laws or treaties of the United States; or in which the United States are plaintiff or petitioner; or in which there is a controversy between citizens of different States; or a controversy between citizens of the same State claiming lands under grants of different States; or a controversy between citizens of State and foreign States, citizens or subjects, either party thereto may have such suit removed for trial into the circuit court of the United States for the district wherein it is pending.¹ And if there be several persons party defendant or plaintiff, either one or more may enforce the rights of removal, if the matter can be properly determinable between them.²

Removal, How Effected. Such removal is effected by filing a petition in the State court, at or before the term at which the suit should be first tried, and before the trial thereof, for the removal of the suit into the circuit court of the United States of the district where such suit is pending, and by making and filing therewith a bond with good and sufficient security for the entering into said circuit court on the first day of its next session, a copy of the record of the suit, and for payment of all costs that may be awarded by said circuit court, if said circuit court shall hold the removal wrongful or improper, and also for the entering into special bail in said suit in said circuit court, if special bail be requisite in the original proceeding in the State court. Thereupon the State court is to accept such petition and bond and proceed no further. Such is the process of removal when the suit is for a money claim or demand.

When Title to Land is Concerned. If the suit be one in which the title to land is concerned, and the parties be citizens of the same State, and the matter in suit exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value is to be made to appear, and one or more of the defend-

¹ Session Act of Congress, March 3, 1875, § 3; Session Acts of Congress, 1874-5, 470.

² Session Act of Congress, March 3, 1875, § 2; Session Acts of Congress, 1874-5, 470.

ants must make affidavit, if required by the court, that the defense will rely upon a right or title to the land under a grant from a State, and shall produce the same, or an exemplification thereof, (if the loss of public records shall not have put its production out of the parties' power,) and shall move the court that any one or more of the other party inform the court whether he or they claim title or right to the land under a grant from some other State; the party or parties so required shall give such information, or else shall not be allowed to plead such grant or give it in evidence on the trial of the cause; and if he or they give information that he or they claim under such grant, then any one or more of the party moving for such information may, on petition and bond as before stated, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party so removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid, as the ground of his or their claim.¹

III. THE RIGHT OF REMOVAL CANNOT BE LIMITED OR BARGAINED AWAY.

The right of an individual citizen, or of a corporation of a State, when sued in the courts of another State by a citizen of such other State, to remove the suit for trial to the circuit court of the United States, when the amount in controversy or other circumstances involved are such as are contemplated by the acts of Congress in that respect, is a right that cannot be limited either by State enactments or bargained away by the citizen or corporation possessing the same. It is a right secured to them by the constitution and laws of Congress made in pursuance thereof upon the subject, to secure to the citizens of a State other than that in which suit may be brought against them in a State court, the removal thereof into the Federal court for trial by complying with the terms of the acts of Congress. Any contract of the party, or a statute law of a State made in abrogation of this right are unconstitutional, and are in their very nature inimical to law, and tend to close the avenues of justice. Every citizen has a right to invoke the power of the courts for vindica-

¹ Act of Congress, March 3d, 1875, § 5; Session Acts of 1874-5, p. 470.

tion and protection of his rights, and may no more barter it away than he may his life or his liberty. He may omit its exercise, or decline to assert it when occasions arise for the opportunity, but he cannot beforehand bargain it away, or bind himself to forego it.¹

The case here cited of *Insurance Co. v. Morse* arose out of a statute of Wisconsin requiring foreign insurance companies, as a condition to doing business in that State, to stipulate against removing to the United States court any suits that might be brought against it in the State courts. The stipulation was made, but subsequently disregarded by the Insurance Company, and the case coming before the United States supreme court upon the validity of the State statute and binding effect of the stipulation, that court held the act of the legislature unconstitutional.

In disposing of the case the court reiterate the often repeated ruling, that a corporation is a citizen of the State by which it is created, and wherein its principal place of business is situated, in so far as that it can sue and be sued in the Federal courts, as others can, and is within the clause of the constitution extending the jurisdiction of the Federal courts to citizens of the different States, and the laws for removal of suits from State courts to the courts of the United States.²

Parties cannot by contract oust the courts of their ordinary jurisdiction. They may compromise their suits and their rights of action already accrued, and give valid acquittals, or bind themselves as to that particular matter not to sue, but a general undertaking not to assert one's legal rights or not to vindicate their injuries in the courts of the country, is void, as inimical to the authority and policy of the law.³

¹ *Insurance Co. v. Morse*, 20 Wall. 445; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Maine, 70; *Hobbs v. Manhattan Ins. Co.*, 56 Maine, 417; *Hatch v. Chicago, R. I. & P. R. R. Co.*, 6 Blatch. 105; *Railroad Co. v. Whiton*, 13 Wall. 270, 285; *Whitton v. Chicago & N. W. R. R. Co.*, 25 Wis. 124; *Union Bank v. Jolly*, 18 How. 506; *Payne v. Hook*, 7 Wall. 425; *Suydam v. Broadnax*, 14 Pet. 67; *Balt. & Ohio R. R. Co. v. Cary*, 28 Ohio St. 208; *Insurance Co. v. Dunn*,

19 Wall. 214; *Doyle v. Continental Ins. Co.*, 4 Otto, 535.

² *Insurance Co. v. Morse*, 20 Wall. 445, 453, 454; *Insurance Co. v. Dunn*, 19 Wall. 214; *Express Co. v. Kountze*, 8 Wall. 342; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286; *Cowles v. Mercer Co.*, 7 Wall. 118; *Railroad Co. v. Whiton*, 13 Wall. 270.

³ *Insurance Co. v. Morse*, 20 Wall. 445, 451; *Kill v. Hollister*, 1 Wilson, (Eng.) 129; *Thompson v. Charnock*, 8 T. R. 139. The two latter are En-

In deciding the case of *Insurance Co. v. Morse*, the supreme court of the United States, HUNT, J., say: "We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the State. These questions have been before the court in other cases, but they do not arise here." Nor can a State make any valid law restricting the right of suit in the courts of the United States; or requiring a person having a right under the constitution and laws of the United States to bring his action in a Federal court; nor can such person be compelled by a State law to first obtain leave of a State court to bring such action; and any State law imposing such restriction or requirement is, in respect thereto, unconstitutional and void. If such a statute be general in its terms, yet its operation must be confined, if valid at all, to the State courts of the State which enacts it, and can have no effect upon the jurisdiction of the United States courts, or in bar of a party's right to sue in a court of the United States, when such party, in all other respects, possesses the requisites of a right of action in said courts.¹ The case here cited of *Phelps v. O'Brien* was brought by a citizen of another State than Iowa, in the circuit court of the United States for the district of Iowa, upon a judgment of an Iowa State court of record against a county. The object was, it is presumed, to obtain more speedy enforcement by execution or *mandamus* than the State courts were inclined to afford. The action was commenced in the United States court in less than fifteen years after the date of the rendition of the judgment sued on. There was at the time a statute law in force in Iowa declaring, that "no action shall be brought upon any judgment against a defendant rendered in any court of record in this State, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party, except in cases where the record of such judgment is, or shall be lost or destroyed." To

glish cases, but the doctrine they assert is the law this day in America as well as in the English courts, and the latter one of the two is believed to be the leading case upon this subject, and as such is cited by the U. S.

Supreme Court in *Insurance Co. v. Morse*. *Doyle v. Continental Ins. Co.*, 4 Otto, 535.

¹ *Phelps v. O'Brien Co.*, 2 Dillon, 518.

the action in the Federal court the defendant demurred, and relied as for cause of demurrer upon said statute, which being a general statute was not by law in Iowa required to be specially pleaded. The court overruled the demurrer, and sustained the right of action in plaintiff; in doing so the court say, DILLON, J., LOVE, the District Judge, concurring: "The case made in the petition falls within the jurisdiction of this court * * * and this jurisdiction cannot be in any mannner limited or affected by State legislation."¹

IV. CITIZENSHIP CAN ONLY BE DISPUTED BY PLEA IN ABATEMENT.

When an action or suit is removed to the United States court, from a State court, under the twelfth section of the judiciary act, if the citizenship of the party, or of either party, is disputed, it must be by plea in abatement; the question cannot be raised or tried during the trial upon the merits.²

Colorable Change of Residence. A merely colorable change of residence or citizenship, into another State, done with a view to confer jurisdiction of a contemplated cause of action upon the United States circuit court, and not with *bona fide* intent of becoming a citizen of the State to which the party removes, will not confer a right to sue in the United States court.

Bona Fide Change of Residence. But if the change of citizenship be *bona fide*, and with honest intention to become and be a citizen of the State removed to, then the right to sue in the Federal court attaches therefrom, although the acquirement of that right may have influenced the removal.³

V. CITIZENSHIP: HOW STATED BY CORPORATION PLAINTIFF.

So, in an action by a corporation, in the United States circuit court, or the removal of an action by a corporation from a State to a United States court, it is not enough that the proceedings allege the corporation to be a citizen of the necessary State, but the statement must be that the corporation is created under the laws of the State.⁴

¹ 2 Dillon, 519.

² Jones v. League, 18 How. 76.

³ Jones v. League, 18 How. 76, 81;

Smith v. Kernochen, 7 How. 198, 215, 217.

⁴ Lafayette Ins. Co. v. French, 18 How. 404.

Nominal Parties will Not Prevent Removal. The citizenship of the real party in interest is alone to be considered in deciding questions of jurisdiction dependent on citizenship, and the joinder of nominal parties to the suit can have no effect to oust the jurisdiction of the United States court.¹

Must Come within the Statute. The right of removal being a statutory right, to obtain the benefit thereof the party must bring his case for removal within the terms of the statute.²

Corporate Residence. The residence of a private corporation is in the State where, by law, or under the laws of which, it is created.³ Though, by the ordinary comity of States, it may do business in other States, if the character of its business is such as to permit of it, and it is not inhibited therefrom by the laws or policy of such other States, yet the transaction of business in another State, though by permission of the law thereof, as, for instance, the leasing, of another corporation existing therein, its corporate works, and therein operating the same, does not make such lessee corporation a corporation of the latter State.⁴ It still remains a corporation of the State where created, and is resident, and, for some purposes, continues to be a citizen thereof, as does a natural person, who is a citizen or resident of one State, still retain his citizenship and residence therein, although he transacts business in a neighboring State.

Hence, a railroad corporation of one State, leasing and operating, by permission of the law of another State, a railroad belonging to a domestic corporation in such other State, is not thereby made a corporation of the latter, or domesticated therein, but still remains a corporation of the State wherein it was created, and foreign to the State wherein it is operating such leased road; and, as a sequence, may, if sued in the courts thereof by a citizen of such State, in a matter of controversy involving over five hundred dollars, exclusive of costs, remove such suit for trial into the circuit court of the United States, under the twelfth section of the judiciary act of the United States.⁵

¹ Wood v. Davis, 18 How. 467.

³ Treadway v. The Chicago & N.

² Insurance Co. v. Pechner, 5 Otto, 183.

W. R. R. Co., 21 Iowa, 351, 359.

⁴ Ibid.

⁵ Ibid.

VI. UNITED STATES COURT IS THE JUDGE OF CAUSE FOR REMOVAL.

When a cause is removed from a State court into a circuit court of the United States, said circuit court is the proper judge of its own jurisdiction, and is not bound to proceed with the cause without satisfying itself upon that subject, but has a right to examine into the question of jurisdiction and decide the same, and to remand the cause to the court from whence it came if sufficient ground for its removal be not shown; and of the cause for removal and sufficiency thereof, the United States court, and not the State court, is the judge.¹

The Citizenship Required is Personal. The citizenship upon which the removal of a cause is dependent, is the *personal* citizenship to the parties, or *persons*, and not to their official relations, authority, or *status*.²

The Citizenship has Reference to the Commencement of Suit. The right of removal being statutory; the party claiming it must bring himself clearly within the provisions of the statute, to enable him to have the benefit thereof. The citizenship requisite to removal must be shown to have been such at the commencement of the suit.³ The averment that a party is a citizen at the time of making the application is not sufficient. It does not follow therefrom that he was such at the commencement of the suit.⁴

When State Court Refuses to Allow Removal. When a party claiming the right of removing a suit to the United States court brings his case clearly within the provisions of the act of Congress, and makes out such a case as entitles him to removal, and the removal is denied to him by the State court, or the State court declines to defer to the application, but on the contrary, proceeds to entertain the cause, then the applicant may apply to the United States circuit court, under the act of Congress of 1875,⁵ for coercive process to place the case in the United States court;

¹ *Urtetiqui v. D'Arcy*, 9 Pet. 692; *Pollard v. Dwight*, 4 Cr. 421; *Wood v. Matthews*, 2 Blatchf. 370; *Dennistoun v. Draper*, 5 Blatchf. 336; *State v. Circuit Judge*, 33 Wis. 127.

² *Amory v. Amory*, 5 Otto, 186; *In-*

urance Co. v. Pechner, 5 Otto, 183.

³ *Insurance Co. v. Pechner*, 5 Otto, 183.

⁴ *Ibid.*

⁵ Act of March 3, 1875, § 7.

and, also, if the State court persists in entertaining the cause, may therein plead such application to the jurisdiction of the State court, and the plea will be effectual; for by such application, when thereby a case for removal is made out, the jurisdiction of the State court is at an end.¹

VII. REMOVAL BY NATIONAL CORPORATIONS.

Corporations created or organized under laws of the United States (except banking corporations), and any member thereof, if sued in a court other than a *circuit* or *district* court of the United States, for alleged cause of action against such corporation, or member thereof as such, may remove such proceeding to the proper circuit or district court of the United States, on petition, verified by affidavit, stating that a defense is relied on arising under, or by virtue of, the Constitution, treaty, or law of the United States, and offering security for entering the proceedings in the United States courts, and by doing such other acts as are required by the act for removal of certain causes, approved July 27, 1866, so far as the same may apply.²

NOTE.—For a very thorough and exhaustive discussion of the subject of Removal of Causes, in all its different phases, the reader is referred to Judge DILLON's excellent Monograph on Removal of Causes, 2 Ed. We have sought to give but a mere outline of this subject, it being somewhat related to our text, and have considered it advisable to refer the reader to Judge DILLON's work for an extended treatment of the same.

¹ *Shaft v. The Phoenix Mutual Life Ins. Co.*, 67 N. Y. 544. ly's Dig. of Laws, Vol. 2, 116, § 18; R. S. of U. S. (1874), 114, § 640.

² 15 Stat. at Large, 227, § 2; Bright-

CHAPTER XXXVII.

TRANSITION FROM TERRITORIAL TO STATE GOVERNMENT.

- I. JUDGMENT RENDERED DURING TRANSITION PERIOD.
- II. DISPOSITION OF RECORDS OF THE TERRITORIAL COURTS.
- III. EFFECT OF CHANGE OF GOVERNMENT ON TERRITORIAL DEBTS.

I. JUDGMENTS RENDERED DURING TRANSITION PERIOD.

Validity of Judgments. Judgments of a Territorial court, rendered between the time of the adoption of a State constitution by the people, and the time of their admission by Congress into the Union as a State, are valid judgments of such Territorial courts; their authority to act as Territorial courts does not cease with the adoption of the constitution, but continues unimpaired throughout the *transition* period, up to the time of their admission into the Union as a State thereof.¹

Termination of the Territorial Entity. The mere act of adopting a State constitution, and other preliminary steps for admission by Congress do not create a State; State entity occurs, and Territorial *entity* ceases in our political system, only by the action of the national government in admitting the Territory and people therein as a State, and thereby terminating the national Territorial authority and government over the same.² The case here referred to of *How v. Kane*, was a proceeding of several judgment creditors by a creditor's bill, or in the nature of it, to enforce their judgments, one of which judgments was rendered by the court of the Territory of Wisconsin after the formation and adoption of the State constitution by the people, and before its admission into the Union as a State. The objection to the force of this judgment was made, that the powers of the Territorial courts had terminated at the time it was rendered, but the court held that their power ended only with the admission of the

¹ *How v. Kane*, 2 Pinn. 531, 547.² *Ibid.*

State into the Federal Union. That in our political system there cannot be any such thing as an American State outside of the Federal Union, and that therefore the Territorial government and authority as creatures of the national power, continues to exist until terminated by admission of the country and people thereof by Congress as a State.

Custody of Territorial Records. By reference to the case of *Hunt v. Palao*,¹ it will be seen that the records of such judgments and Territorial courts after dissolution of Territorial government, properly belong to the Federal, and not to the State courts, since the Territorial courts were United States courts, and their records should pass into the keeping of the United States courts, and that no law of the newly created State can control them. This subject, however, will be more fully discussed in the next succeeding section of the present chapter.

II. DISPOSITION OF RECORDS OF TERRITORIAL COURTS.

Territorial courts are courts of the United States. When the country of the Territory is organized into a State, the records of the Territorial courts are not proper subjects of State control, but are subject to the control of the United States.² It is for Congress to declare to what tribunal or keeping these judicial records shall be transferred. No law of the State can control the same.³ If left in the custody of an officer of such State or clerk of one of the State courts, a writ of error from the United States Supreme Court does not lie to carry the case to that court, although the case may have been such as that the writ would have been effected to the Territorial court during its existence.⁴

So, the Cherokee nation, so called, is a Territory of the United States, like unto Territorial governments of the second grade, so called formerly under the ordinance of 1787, with the exception that they make their own laws, appoint their own rulers and officers, and pay their own expenses; yet they are under the protection of the national government, and by treaty are to be entitled to a delegate in Congress of their own selection whenever Congress may provide therefor. Their laws and regulations,

¹ 4 How. 589.

² *Hunt v. Palao*, 4 How. 589; 9 U. S. Stat. at Large, 128, 212.

³ *Hunt v. Palao*, *supra*; 9 U. S. Stat. at Large, 128, 212.

⁴ *Hunt v. Palao*, *supra*.

however, are not to be inconsistent with the Constitution of the United States and laws of Congress regulating trade and commerce with the Indians.¹ Such being the case, their courts may appoint administrators of the estates of decedents in their country with the same regularity and responsibility as if granted by State courts;² and such administrators come within the 11th section of the act of Congress of 24th of June, 1812, declaring that "it shall be lawful for any person or persons to whom letters testamentary or of administration have been or may hereafter be granted, by the proper authority of any in the United States, or the Territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or administration had been granted in the District." Therefore, an administrator appointed in said Cherokee nation may sue in said District of Columbia, contrary to the common law doctrine that such powers may not be exercised in other jurisdictions than where obtained.³ So, too, by force of the same act, the right to sue in said District is conferred upon administrators and executors generally, of all the States and Territories of the United States, in express terms.

III. EFFECT OF CHANGE OF GOVERNMENT ON TERRITORIAL DEBTS.

By transition from a Territorial government into a State government, the debts of the Territory are not extinguished, but by a principle of national law become debts of the State. The mere change of government or of rulers, or even of the allegiance of a people, does not affect their obligations. The new governments succeed to all the fiscal rights and liabilities of the former government, of a civil nature. The new governments take the country *cum onere*.⁴ Hence, where by the law of a State, the State may be sued, a civil action lies against such State upon a debt of the Territory which was superceded by the State.⁵ If such were not the case upon general principles in regard to the Territorial indebtedness attaching itself to the State, yet it is held that such is the effect of a provision of the State constitution as follows: "That no inconvenience may arise by reason of

¹ Mackey v. Cox, 18 How. 100.

² *Ibid.*

³ *Ibid.*

⁴ Wheaton on International Law, § 63; Baxter v. State, 9 Wis. 38.

⁵ Baxter v. State, 9 Wis. 38.

a change from a Territorial to a permanent State government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, should continue as if no such change had taken place." ¹

¹ Baxter v. State, 9 Wis. 38.

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